Nos. 18510 to 18519, 18521 to 18531, and 18533, 18866 to 18868, and 18870 to 18872

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED AIR LINES, INC.,

Appellant,

vs.

JANICE WIENER, *et al.* (24 cases), and CATHERINE B. NOLLENBERGER, *et al.* (excluding FAITH C. PARIS, *et al.*) (6 cases),

Appellees.

UNITED STATES OF AMERICA,

Appellant,

vs.

JANICE WIENER, *et al.*,

Appellees.

APPELLEES' BRIEF.

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Preliminary Statement.

This brief is filed in response to the opening brief of appellant United Air Lines, Inc. (hereinafter referred to as United), and the opening brief of appellant United States of America (hereinafter referred to as the Government) on behalf of each and all of the plaintiff-appellees in the above designated thirty-one appeals (listed in Part I, pp. 1-11 of "Appendix to Opening Brief of Appellant United Air Lines, Inc."), except

the *Paris* case, No. 18869.[1] The procedural steps in the trial court, with one exception, relating to the second series of cases (*Nollenberger, et al.,* Nos. 18866-18872), are accurately set forth in the Preliminary Statement to the opening brief of United and will not be restated. United correctly states that after the trial of the twenty-four consolidated cases known as *Wiener, et al.,* a second series of cases (*Nollenberger, et al.,* Nos. 18866-18872, hereinafter referred to as the Nevada cases) were by stipulation on the basis of *forum non conveniens* transferred to the United States District Court for the Southern District of California. However, the issue of liability in the Nevada cases was determined on a Motion for Summary Judgment by the United States District Court of Nevada prior to the transfer. [Matlock R. 393.][2] Thereafter, by stipulation of the parties, the cases were transferred for trial on the issue of damages only. [Matlock R. 341.] After the damage trials had been concluded, the trial court on its own motion ordered *all* matters and proceedings in the Nevada cases, not theretofore transferred to the United States District Court for the Southern District of California, so transferred. [Matlock R. 592.]

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[1]Although at the time of the stipulation consolidating all cases for hearing on appeal, counsel filing this brief were authorized to act on behalf of all appellees including the appellee in the case of *Paris v. United Air Lines,* that authority has been withdrawn in the *Paris* case and, accordingly, this brief is filed on behalf of all of the appellees in all of the cases excluding, however, the appellee in the *Paris* case.

[2]The form of record citations and abbreviations utilized by appellant United Air Lines, Inc., in its brief as described at pages 3-5 thereof, will be followed here; references to the transcripts in the damage trials will set forth just preceding each transcript reference the family name of the individual appellee in each case; the "Opening Brief of Appellant United Air Lines, Inc.," will be referred to as "U. Br." and that of the Government as "G. Br.".

The statements with respect to jurisdiction at pages 5 to 6 of the opening brief of United and page 2 of the opening brief of the Government are correct and will not be repeated.

Statement of the Case.

Appellees will follow the same format adopted by both appellants in their opening briefs and will discuss the detailed facts in the appropriate portions of the argument. Except as specifically noted below, the central facts set forth by United (U. Br. 5-7) and by the Government (G. Br. 2-3), are correct and uncontroverted. The assertion by United that "the jet descended upon the DC-7 at angle of descent of seventeen degrees at the time of impact" is misleading.[3] At the time of impact, United's DC-7 was flying straight and level at an altitude of twenty-one thousand feet. The Air Force jet was engaged in an evasive maneuver which immediately prior to the collision sharply altered its angle of descent; at the very instant of impact, the angle of descent of the jet was seventeen degrees. However, prior to the evasive maneuver initiated seconds before the collision, the angle of descent of the jet was approximately five degrees.[4]

Questions Involved.

The questions concerning liability by United (U. Br. 9-11) might more distinctly and accurately be stated as follows:

1. Is there any reasonable basis in the evidence from

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[3]United predicates its argument that the findings of negligence on the part of its pilots are without any evidentiary support upon this inaccurate statement.

[4]The details of the evidence and record citations concerning these matters appear at pages 11-15, *infra*.

which the jury might have found or inferred that the death of plaintiffs was proximately caused or contributed to by the negligence of United?[5]

2. Whether, under the law applicable in this case, the doctrine of *res ipsa loquitur* applies against a common carrier for the benefit of its passengers, in a wrongful death action arising from a collision between an airplane in the exclusive control of the common carrier and another airplane not so controlled; and whether the giving of the *res ipsa* instruction by the trial court constituted reversible error.

3. Whether the granting in the Nevada cases, of the Motions for Summary Judgment on the issue of liability based upon a finding that the *Wiener* judgments were *res judicata* constituted reversible error solely because the judgments in the *Wiener* cases were pending on appeal.

4. Whether the District Court erred in the *Nollenberger* and *Matlock* cases in changing the amounts of the general verdicts in order to conform them to the answers to special interrogatories given by the jury.

The questions involved in the appeals as between the Government and appellees are adequately stated in its brief.

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[5]See *Lavender v. Kurn,* 327 U. S. 645, 652, 653, indicating that this is the question on appeal, rather than whether certain alleged "implied findings of the jury" are without substantial support in the evidence.

Summary of the Argument.

United makes no contention that the evidence is insufficient to establish negligence of its crew members other than that their alleged inability to see the Air Force jet, because of structural limitations of the DC-7, rendered it impossible for them to take any action to avoid the collision. Contrary to United's assertions, the evidence supports the conclusion that the United crew members were not impeded in their ability to see the Air Force jet. The fact that there was no such impediment negates United's arguments that the DC-7 crew members could not have been negligent, as well as its contention that the negligent failure to take pre-collision precautions, directed towards the exercise of vigilance and effective scanning by United's crew, could not have been a proximate cause of the accident. The evidence establishing the negligent failure to take evasive action as a proximate cause of the fatal collision is substantial, voluminous and compelling.

United argues that it was not legally bound to anticipate hazardous flying by Air Force jets and that it could operate its planes through the Las Vegas-Nellis area relying on the assumption that jets would be operated carefully. This contention disregards the evidence against United on this score. The evidence establishes: that United had actual knowledge that the area in which the collision occurred was extremely hazardous because of high speed flying by, and the reckless operation of, Air Force jets in said area; that it was not possible for United to deal with these hazards or to take any action calculated to safeguard its passengers, unless it first ascertained the facts concerning the precise nature of the Air Force activity in this

dangerous area; that United failed to take a single step directed towards obtaining such specific facts; that instead United disregarded specific information which it possessed and recklessly continued to fly through this hazardous area without taking any precautions whatsoever; that because of the complete failure of United to institute any kind of a safety program for its planes flying through the Las Vegas-Nellis area, the tragic accident resulted.

When a common carrier flies through an area with knowledge that the conduct of others in that area creates a hazard to its passengers, the carrier may not escape liability on the ground that the exact cause of the hazard is unknown to it. To the contrary, it has the duty first to ascertain the nature of the activities creating the hazard and then to take the steps necessary to deal with it. The negligence of United in this regard is conclusively established by admissions of United and its officials.

United argues that a *res ipsa loquitur* instruction was erroneously given because Nevada law applied, and because under that law *res ipsa* was not applicable. Every aspect of this argument is wrong. The District Court was sitting as a California court at the time of the trial of the *Wiener* case. It properly looked to the law of the forum to determine whether the application of the *res ipsa loquitur* doctrine is considered substantive or procedural. Under California law, it is held to be procedural. It follows that applying the forum's conflict of law principles, as is required, the trial court properly instructed the jury with respect to the California law regarding *res ipsa.* Moreover the law of Nevada is to the same effect, and even if it were applicable, the instruction given was correct.

United contends that in the Nevada cases, the Motions for Summary Judgment on the liability issue were erroneously granted because the court held that the *Wiener* judgments were *res judicata* despite the fact that they were pending on appeal and despite California law that a judgment pending on appeal is not final for the purpose of *res judicata.* This position overlooks a number of essential factors and embraces a number of errors.

In the first place, the judgments set up as *res judicata* include the judgments on the counterclaims under the Tort Claims Act, in which the trial court was sitting as a federal court and in which the negligence of United was established as the basis for the judgments. If the law of the forum rendering the judgment is applicable, then the federal law relevant to the tort claims judgments renders them final for purposes of *res judicata* despite the pending appeal.

If it is necessary to look to the law of the forum which rendered the summary judgment the Nevada law applies, for the trial court was sitting as a Nevada court in Nevada cases when it rendered that judgment. Nevada law likewise applies if the *situs* of the accident controls. Concededly, the *Wiener* judgments were final for purposes of *res judicata* under Nevada law. The last possibility is that federal law applies because the appeal in the *Wiener* cases is being heard by a federal court, in which event, as has already been noted, there is the requisite finality.

Assuming *arguendo* that California law applies, the fact that the seven *Nevada* cases are being considered on appeal together with the *Wiener* cases renders the

question moot. If United were to secure a reversal in the *Wiener* cases then obviously the same result should follow in the *Nevada* cases. If, however, appellees should prevail against United in the *Wiener* cases, it would be a matter of formal ritual to reverse the *Nevada* cases because the California cases were not final at the time that the Motion for Summary Judgment was granted. Then there would be no injury judicially cognizable in refusing to reverse the Nevada judgments, which reversal would require the unnecessary repetition of the Summary Judgment proceedings. An additional basis for affirming the judgment on liability in the *Navada* cases is the fact that the uncontradicted evidence presented on the motions for summary judgment establishes conclusively that United could not meet the inference of negligence arising out of the *res ipsa loquitur* doctrine.

United asserts that the trial court committed error when it corrected the jurors errors in computation and conformed the general verdicts to the correct computations in two *Nevada* cases. It is argued that this action deprived the appellant of the right to have the jury determine whatever amount of damages it deemed fair and just. What the District Court did in the *Nollenberger* and *Matlock* cases was to increase the general verdicts of the jury in order to make them conform to the special verdicts as permitted and required by Rule 49(b) of the Federal Rules of Civil Procedure. In so doing, the Court did not invade the province of the jury; rather, it followed and implemented the special verdicts of the jury, which were controlling as against the general verdicts. Nevada law requires the jury to award pecuniary damages, and a judgment cannot be

fair and just unless it covers the pecuniary loss suffered by plaintiffs. The jury by its answers to the special interrogatories determined the various elements of pecuniary damages, thus deciding what was fair and just in each case.

The Government relies primarily on the "discretionary function" exception to the Tort Claims Act. However, the Government does not assert that its "discretionary function" defense applies to pilot negligence. It relies on the fact that the pilots of the jet took evasive action as establishing the non-existence of pilot negligence. But the pilots had the duty to evade—not simply to take evasive action; they were bound to yield the right-of-way to the DC-7. This failure to comply with these legal requirements affords full support to the trial court's findings of pilot negligence.

The Government claims that all other findings of negligence, including the failure of the pilots of the jet to secure either an I.F.R. clearance or traffic information, fall within the "discretionary function" exception to the Tort Claims Act. The evidence supports the conclusion that the pilots of the jet could have asked for either an I.F.R. clearance or traffic information without violating orders, thus even under the Government's view of the law, affording an additional basis for pilot negligence outside the ambit of the discretionary function exception. These findings of pilot negligence make it unnecessary for the Court to reach the question of discretionary function. However, in that area the authorities relied on by the Government simply do not relate to the facts of this case.

The conduct of the Nellis command involved negligence in the implementation of regulations and the

failure to observe safety requirements established as the fundamental policy of the Air Force. The Air Force itself required the commander and other Nellis personnel to exercise certain precautions and to effectuate the regulations in a safe manner; their negligent conduct was a violation of those orders, not the exercise of a discretionary function. The negligent acts in establishing and maintaining the KRAM practice penetration procedure, were committed at the operational—not the policy-making level. Under these circumstances, the law is clear; the defense of discretionary function has no application.

The only basis for the Government's argument that the evidence does not support the findings of negligence in the establishment and use of the KRAM practice penetration procedure is that the Air Force believed the procedure to be safe and that there was no prior accident even though there had been a very large number of such practice flights before the collision. At most, this evidence created a conflict with other evidence; the trial court on the basis of substantial evidence establishing negligence resolved this conflict against the Government.

The evidence fully supports all of the findings of the trial court against the Government and the conclusions of law are correct as applied to the facts of this case.

ARGUMENT.

I.

The Record Amply Supports the Findings That the Crew of United's DC-7 Could See the Air Force Jet as It Descended Upon Them and That the DC-7 Crew Negligently Failed to Take Evasive Action to Avoid the Jet.

A. There Was No Obstruction Which Prevented the United Pilots From Seeing the Approaching Jet.

United contends (U. Br. 53-56, 65-66), that the jury verdict is not supported by any evidence establishing operational negligence on the part of the crew of the DC-7. The only bases for this argument are the assertions that due to structural limitations of the DC-7 windscreen, the scanning capacity of the crew was limited to approximately ten degrees above the horizontal; that the Air Force jet approached the DC-7 at an angle of descent of seventeen degrees; and that, therefore, the crew of the DC-7, being unable to see the approaching Air Force jet, was not negligent in failing to take evasive action. The evidence does not support these conclusions but, to the contrary, affords ample basis for findings by the jury directly opposite thereto.

In the first place, there is no evidence to support the assertions as to the DC-7's structural limitations relied on by United. The only record reference cited on this point quotes a witness, in connection with an answer to a hypothetical question, to the effect that he assumed that the DC-7 pilots confined their search to ten degrees above and below the horizon (U. Br. 54.) Neither he nor any other witness stated that any structural limitation of the DC-7 limited visibility for

its pilots. To the contrary, the witness Brennan testified that structural limitations "will vary from cockpit to cockpit." [44 Rep. Tr. 5837.]

More important is the fact that there is no evidence whatsoever to support the conclusion that the angle of descent of the Air Force jet was seventeen degrees except at the very time of collision. The computation of the seventeen-degree angle of descent was made from a study of the wreckage from which it was possible to establish the relative position of the two planes at the instant of impact. This computation afforded no information whatsoever as to the angle of descent prior to the collision because, at the point of impact, the jet was engaged in an evasive maneuver. [25 Rep. Tr. 3441-3442; 43 Rep. Tr. 5672-5673, 5685-5686, 5692-5693; 44 Rep. Tr. 5903-5904.] Based upon the evidence relied upon by United on this point, the one thing that it is possible to say with certainty is that prior to the beginning of the evasive maneuver the relationship between the two planes was different than it was at the time of impact.

Mathematical computations, based upon the physical facts, demonstrate that the angle of descent was much closer to five degrees than it was ten. United (U. Br. 29) relates the alleged angle of descent of seventeen degrees to a seven thousand foot drop in about two minutes, recognizing the obvious fact that the total descent in a given period of time while traveling at a certain speed through a given amount of air space is directly related to the angle of descent. The problem with United's position is that when these principles are applied to the evidence in this case, they demonstrate the fact that the angle of descent was much less than

ten degrees. At a seventeen-degree angle of descent, the jet would have descended at the rate of one hundred thirty-eight miles per hour, something in excess of ten thousand feet a minute. [42 Rep. Tr. 5613.] If the jet had been flying at that angle of descent prior to the time that it commenced its evasive action, it would have dropped more than twenty thousand feet in two minutes. Rather than colliding with the DC-7 at an altitude of twenty-one thousand feet two minutes after departing twenty-eight thousand feet, it would have been at an altitude of less than eight thousand feet and there would have been no collision. The fact that the plane descended only seven thousand feet in two minutes establishes that the angle of descent was about one-third of seventeen degrees or between five and six degrees.

This is verified by another bit of testimony. At a five-degree angle of descent, a plane will descend 458.36 feet per mile. [28 Rep. Tr. 3880.] The distance that the Air Force jet traveled from its departure at twenty-eight thousand feet to the point of collision at twenty-one thousand feet was approximately sixteen miles [10 Rep. Tr. 1329; 18 Rep. Tr. 2396-2397; 25 Rep. Tr. 3444], during which time there was a total descent of seven thousand feet. Sixteen miles at a rate of 458.36 feet of descent per mile establishes a drop of almost precisely seven thousand feet, indicating that the angle of descent was almost exactly five degrees. Incidentally, five degrees is the angle of descent called for in the KRAM procedure which, it was stipulated, was being executed at the time of collision. [4 Rep. Tr. 499, F. 19; 11 Rep. Tr. 1493-1494.]

The angle between the two planes would have been five degrees if the DC-7 had been standing still at the

point of collision as the jet was descending. Actually the DC-7 was about thirteen miles from the point of collision when the jet was departing twenty-eight thousand feet. [10 Rep. Tr. 1329.] Accordingly, the angle between the two planes was much less than five degrees at the point where the pilots of each plane should have seen the other plane and taken evasive action.

One witness using the assumption that the observer in the Air Force was scanning ten degrees up and ten degrees down [27 Rep. Tr. 3740] testified that it was possible for the descending jet's observer pilot to see the DC-7 at a distance of 7.28 nautical miles, *i.e.* 8.38 statute miles or farther. [27 Rep. Tr. 3732; 28 Rep. Tr. 3886; 29 Rep. Tr. 3904-3905.] The same witness testified that under the same circumstances the pilots of the DC-7 had substantially the same ability to sight the Air Force jet as the observer of the jet had to see the DC-7 [28 Rep. Tr. 3811.]

Further support in the evidence for the conclusion that there was no obstruction to vison came from the testimony of a pilot who, after the accident, flew a number of test runs following a course on Victor 8 similar to that being flown by the DC-7 prior to the collision. During this entire procedure, he could see the air space through which a plane flying the KRAM procedure starting at a twenty-eight thousand foot altitude would have been operating. [37 Rep. Tr. 4949-4952, 5030.][6]

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[6]United relies on the testimony of an eleven-year old boy (who at the time of the accident was nine years old and in the second or third grade) who observed the planes from a school playground. [45 Rep. Tr. 5993-5997.] He first testified that he couldn't tell the relationship between the jet and anything else in the sky before the collision and that he couldn't tell whether the jet "dove or rose high in the sky or anything before the col-

From all of this testimony, it appears that the evidence not only supports a conclusion that the angle of descent of the Air Force jet was less than 10%, but that actually no other conclusion has any support in the evidence. It follows that even accepting United's unsupported assumption that structural limitations limited vision to a ten-degree angle upward, there was adequate evidence for the jury to find that there was no obstruction which prevented the crew of the DC-7 from seeing the Air Force jet as it descended from an altitude of twenty-eight thousand feet to the point of collision at twenty-one thousand feet.

B. The Rate of Closure Did Not Prevent the United Pilots From Seeing the Jet and Taking Evasive Action.

Neither United nor the Government make the outright assertion that the evidence compels the conclusion that the rate of closure between the two aircrafts was so great that their pilots lacked the ability to see the other plane and to take the evasive action required to avoid a collision. However, both appellants refer to evidence of "experts" who testified as to the percentage of probability of the pilots of the two planes seeing and avoiding, disregarding the testimony of other experts who testified that the procedure was a safe one if the pilots maintained the vigilance required of pilots flying under such conditions.

It was estimated that the rate of closure was approximately 674 knots or 774 miles per hour. [44 Rep. Tr.

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lision" because he "was interested in the airline; it was closer and bigger." He couldn't even tell which side the jet was on before it hit. [45 Rep. Tr. 5997-6000.] Elsewhere, he did testify that the jet swooped down on the DC-7. Even if such evidence were deemed to create a conflict, the verdict of the jury based upon substantial evidence would not be affected.

5774.] The testimony of the experts referred to by appellants related to possibilities on a percentage basis of seeing and avoiding at this rate of closure. One expert did testify that there was no possibility of the pilots of one plane seeing the other plane at a distance of less than eight miles and only a slight possibility of that. The conclusions of these experts, according to their own admissions, were based upon inadequate data and upon assumptions unsupported in the record which conflicted with each other as much as 500%. [28 Rep. Tr. 3886, 3891.] If one expert had accepted the other expert's premises, the maximum distance of visibility would have been changed from 7.28 miles to 25 miles or even higher. [27 Rep. Tr. 3759; 28 Rep. Tr. 3886.]

An attention factor of 25% was assumed, *i.e.,* that the pilots were devoting twenty-five per cent of their time to scanning for other planes, based upon the witness' opinion as to the various things the pilots might be doing and upon their lack of efficiency, and disregarding the fact that in the DC-7 there were two pilots rather than one required to scan. [27 Rep. Tr. 3745-3746.] These assumptions, if they had evidentiary support, themselves would have afforded an adequate basis for a finding of negligence on the part of the pilots, in view of the manifest hazards present in the area and of the high degree of care required of the pilots.

One of the experts, directly contrary to the fact, assumed a head-on approach between the two planes which assumption greatly reduced the computed possibilities of seeing and avoiding. [44 Rep. Tr. 5794.] Another expert failed to give consideration to the light from the edges of the wings and from the tops of the motors

or to the effect on visibility by reason of the angle of approach of the two planes or to the fact that motion up and down which attracts the eye was present. [28 Rep. Tr. 3846-3847, 3888, 3895-3897.] The same expert who testified that the plane could not be seen until it was less than eight miles away admitted that sometimes you could see landing gear come down when a plane was as much as three and a half to four miles away. [29 Rep. Tr. 3906.]

In addition, the experts assumed that there was a three and a half second reaction time from the time of sighting but on cross-examination the assumption did not fare too well. The jury was certainly justified in deeming that assumption many times too high, particularly in light of the one-half second reaction time generally recognized as required for an automobile driver. [28 Rep. Tr. 3851-3868.]

Notwithstanding their attempt to show the difficulty of seeing and avoiding at the rate of closure involved the testimony of expert witnesses estimated 6.5 seconds as the total time from detection until completion of an avoidance maneuver of one hundred fifty feet; in 7.5 seconds, the effect of the evasive maneuver would be increased to four hundred feet. The pilots, according to the expert, would have had twenty seconds in which to avoid a collision—about three times the necessary time even if only one pilot reacted. [27 Rep. Tr. 3654; 29 Rep. Tr. 3918, 3960-3961.]

The record contains a large volume of evidence ignored by both appellants which supports the conclusion that the pilots of each of the planes involved, if they had exercised the care required of them by law, could have prevented the accident by seeing and avoiding the

other plane. Among the highly qualified witnesses who testified to this affect were General Quesada, the first administrator of the Federal Aviation Agency with a distinguished record in aviation [31 Rep. Tr. 4111-4118, 4226, 4229-4231; 32 Rep. Tr. 4296], General Caldara, an Air Force expert in the field of flight safety [8 Rep. Tr. 1059-1066; 9 Rep. Tr. 1165-1169; 10 Rep. Tr. 1293-1296], General McGehee, who was the Commanding General at Nellis Air Force Base at the time of the accident [19 Rep. Tr. 2502-2509, 2541-2543], Captain Ennis, who coordinated the agreement concerning the KRAM procedure between the Air Force and C.A.A. [19 Rep. Tr. 2421-2428, 2487-2489], Major Howell, an Air Force specialist in flying safety [21 Rep. Tr. 2807-2811, 2837], Ralph F. Vroman, a specialist in air traffic employed for many years by the C.A.A. and the F.A.A. in important positions [22 Rep. Tr. 2914-2918; 2960-2961], Captain Covault of Nellis Air Force Base [25 Rep. Tr. 3418-3422, 3453-3454], and Colonel Davis, who was Wing Director of Operations at Nellis Air Force Base at the time of the accident. [10 Rep. Tr. 1340-1344; 12 Rep. Tr. 1623; 13 Rep. Tr. 1655-1656, 1659-1661.]

The fact that there had been such a tremendous volume of similar flying in high traffic density over a long period of time without a collision was itself evidence which the jury could consider in determining the ability of the pilots to see and avoid. [14 Rep. Tr. 1878; 16 Rep. Tr. 2110-2114; 17 Rep. Tr. 2229-2238; 19 Rep. Tr. 2577; 20 Rep. Tr. 2625-2634, 2644-2651; 25 Rep. Tr. 3447-3450.] A number of witnesses who had flown planes repeatedly in the Las Vegas area testified concerning their ability to see Air Force jets and

DC-7's flying in the vicinity at such distances that there can be no question that there would have been ample opportunity to take evasive action in each case if that had been necessary. [17 Rep. Tr. 2278; 20 Rep. Tr. 2661-2662; 24 Rep. Tr. 3243-3244; 33 Rep. Tr. 4519; 36 Rep. Tr. 4866-4867; 37 Rep. Tr. 4983, 5021-5025; 40 Rep. Tr. 5371-5372.] A pilot made a test run after the accident and reported thereon to the effect that "it would have been possible to observe the F-100 from its position over Radio Station KRAM at twenty-eight thousand to the point of mid-air collision",—a distance of approximately sixteen miles. [45 Rep. Tr. 6027-6029 at 6029.]

On the day of the accident, the jet was observed falling from a point about sixteen miles away. [40 Rep. Tr. 5449, 5458-5459.] A jet pilot who was in the air at the time of the accident saw a streak of fire and then spotted the DC-7 and engine falling out of it at a distance of approximately fifteen miles and he was even able to tell the order in which they fell. [40 Rep. Tr. 5427-5433.] In addition, there was evidence that the jet left a vapor trail, known as contrails which, of course, increased the ease of sighting to a great extent. [45 Rep. Tr. 5998.]

Evidence of experience under extremely difficult flying conditions also supports the conclusion that had the pilots been vigilant as required, they would have been able to see and avoid. Nellis Air Force Base had a great deal of experience with flying at higher rates of speed resulting in much higher rates of closure than were present here, under much more difficult flying conditions, performed on a large scale with planes

repeatedly passing in close proximity to each other, which activities had been carried on for many years without a single collision. [13 Rep. Tr. 1687-1710; 14 Rep. Tr. 1813-1814; 17 Rep. Tr. 2252-2278.] Thus, the record contains support reinforced many times over for the conclusion that the pilots of each of the planes had the capacity to see the other plane approaching and to take evasive action which would have avoided the collision.

C. The Failure to See and Avoid the Jet Establishes the Negligence of United.

C.A.R. 60.15 reads "No person shall operate an aircraft in such proximity to other aircraft as to create a collision hazard". United notes that the jet was "operated in such proximity to the DC-7 as to create a collision hazard"; that such operation violated C.A.R. 60.15; and that such violation constitutes negligence *per se,* thus unequivocally establishing that the jet was operated negligently. (U. Br. 25.)

But C.A.R. 60.15 was also violated by United when the DC-7 was operated in such proximity to the Air Force jet as to create a collision hazard. The very regulation that establishes negligence on the part of the Government does so equally with respect to United.[7]

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[7]This is true regardless of which plane has the right-of-way. See note to C. A. R. 60.14 to the effect that possession of the right-of-way does not relieve "the pilot from the responsibility for taking such action as will best aid to avert collision". *Cf.* Government Ex. 2, page 51, Item 4. See also testimony of Mr. Larned, the Manager of Flight Operations of United [33 Rep. Tr. 4440];

> "Q. Now, do you know of any situation in which a pilot operating a plane in airspace is relieved of the responsibility of taking whatever action will best serve to avoid a collision? A. No. I do not." [35 Rep. Tr. 4712.]

The fact that the DC-7 was flying with a traffic clearance does not negate United's negligence. ". . . the focal point of ultimate responsibility for the safe operation of aircraft under V.F.R. weather conditions rests with the pilot. Under such conditions, he is obligated to observe and avoid other traffic, even if he is flying with a traffic clearance." *United States v. Miller* [C. A. 9, 1962], 303 F. 2d 703, 710.

II.

The Record Amply Supports the Findings That the Crew of United's DC-7 Negligently Failed to Secure Traffic Information.

There was evidence, ignored by United in its brief, from which the jury might properly have found that the United pilots were negligent in failing to obtain information concerning Air Force jet traffic in the Las Vegas-Nellis area. There existed an adequate communications system whereby such pilots could have sought and obtained information regarding military flights over the airway. [5 Rep. Tr. 599-660, Item 56; 20 Rep. Tr. 2674; 22 Rep. Tr. 2917-2920, 2929-2931, 2963-2964; 40 Rep. Tr. 5453-5456, 5460-5463.][8]

There was evidence that if the DC-7 had contacted Nellis, it would have received information to the effect that Nellis was at that time carrying on KRAM jet penetrations. [10 Rep. Tr. 1282; 18 Rep. Tr. 2400-2401.] It was conceded that no attempt was made to obtain such information. [5 Rep. Tr. 551.] Arrange-

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[8]The same communications systems permitted jet pilots to seek and obtain information concerning commercial planes flying I.F.R., along Victor 8, including the DC-7 involved in the accident. See citations., *supra,* and in addition, [22 Rep. Tr. 2934-2939, 2952-2953; 40 Rep. Tr. 5400-5401.]

ments for exchange of in-flight information between the Air Force and United had been made at Merced because of the existence of "some potential conflict" between Air Force planes and commercial planes. [35 Rep. Tr. 4698.] The failure of United to establish and of its pilot to follow a similar procedure in the dangerous Las Vegas-Nellis area certainly affords an additional basis for the conclusion that United was negligent.

III.

The Jury Verdict Is Supported by Substantial Evidence of United's Negligence With Respect to Its Failure to Take Reasonable Precautions Prior to the Fatal Flight.

A. United's Knowledge of Hazardous Flying Conditions Put It on Notice of the Great Risk of Mid-Air Collisions in the Las Vegas-Nellis Area.

United admitted that it knew "that Nellis Air Force Base was a training base operated by the Air Force for Century series jet aircraft. * * * [and] that extensive jet flying was conducted from Nellis Air Force Base." [4 Rep. Tr. 501.] Mr. Larned, Manager of Flight Operations of United Airlines [33 Rep. Tr. 4439-4440], testified that he saw jets descending on Victor 8, that he know that they descended at speeds of approximately five hundred miles per hour through the twenty-one thousand foot altitude (the altitude at which the collision occurred) and that they created a potential closure rate with United's planes of seven hundred to eight hundred miles per hour. [33 Rep. Tr. 4566-4567.]

United's Assistant Vice-President of Flight Operations and United's Director of Flight Safety as of the

time of the accident both testified that long before the mid-air collision United was aware of the fact that as a matter of common practice the Air Force jets were flying without I.F.R. clearances in the Las Vegas-Nellis area and that United's pilots had to rely on seeing and avoiding these jets to prevent collisions. [29 Rep. Tr. 3987-3988; 30 Rep. Tr. 4064-4065.] Various witnesses including other high United officials also testified that they were aware of the large volume of military air traffic that would be operated in the area on a see-and-be-seen basis; that the fact that planes flying in Victor 8 might reasonably expect to encounter Air Force jets flying in this area was revealed by maps and by the manual available to and used by United pilots. [8 Rep. Tr. 983-986, 1040-1042; 24 Rep. Tr. 3199-3202, 3234-3238; 25 Rep. Tr. 3358; 38 Rep. Tr. 5090.]

The F-100 jet being flown in this area was one of the fastest operational planes in use in 1958. [32 Rep. Tr. 4301; 38 Rep. Tr. 5121.] In fact the normal speed of the F-100 was more than the speed designated for the KRAM procedure. [13 Rep. Tr. 1681-1682.] At all times during week-days, there would be approximately sixty of these high-speed jet aircraft in the air in the vicinity of Nellis. Each day between the hours of 7:00 A.M. and 4:00 P.M., Nellis would have between five and six hundred take-offs and landings, each of which would require travel over the airway on which the collision occurred, with jets crossing the airway at the rate of about one a minute. [20 Rep. Tr. 2626-2636, 2647-2651.]

United knew that wherever there was a fairly active major Air Force Base, military flying activity relying

on the principles of see-and-be-seen as a means of avoiding collisions could be expected; they knew that this resulted in an intermixture of I.F.R. (controlled) and V.F.R. (uncontrolled) traffic over the airway on which the collision occurred; such intermixture, United officials believed, created a *"lethal"* or *"deadly"* or *"fatal"* condition. [35 Rep. Tr. 4751; 36 Rep. Tr. 4808-4829.]

If the foregoing were all of the information that United had, it would have been sufficient to put it on notice of the necessity of taking some action in order to guard against mid-air collisions between United's planes and Air Force jets in the Las Vegas-Nellis area. But this is only the beginning. United admittedly knew from information received from pilots that the area in question was "one in which the hazards of mid-air collisions were very grave * * * in which there appeared to be a particularly irresponsible type of military flying." [33 Rep. Tr. 4521-4522; 34 Rep. Tr. 4591, 4635-4637, 4647-4648.] Reports of near misses between United planes and Air Force jets in the general area further served to put United on notice of the hazards existing in the area. [39 Rep. Tr. 5252-5272; Exs. U. 80, A, B and C, 81, 82 and 83.]

Finally, on the question of notice, we come to an item of evidence which establishes that United was directly warned of the possibility that in the precise area where the accident occurred, KRAM penetrations were being practiced without I.F.R. control. About the middle of 1957, Colonel Davis of Wing Operations of Nellis Air Force Base appeared before a meeting of the Las Vegas Chamber of Commerce Aviation Committee at which was present Mr. Hyde, the Las Vegas Station

Manager of United. At that meeting, those present were given a complete briefing of Nellis operations, with Colonel Davis utilizing a map [Ex. G. 57], copies of which were handed out to those present, including Mr. Hyde. The briefing included information concerning all the traffic and normal patterns flown at Nellis including a description of the instrument let-down procedure, the volume of traffic and the number of missions flowing in and out of Nellis. [Ex. U., 11 Rep. Tr. 1501-1509; 12 Rep. Tr. 1583-1594; 13 Rep. Tr. 1765-1769.] The map had a circle covering the area twenty-five miles in every direction around Las Vegas, and Colonel Davis advised those at the meeting that Nellis practiced instrument approach in that area, implying, at least, that these operations were conducted without I.F.R. clearances. [12 Rep. Tr. 1591-1592.]

Following the request of Colonel Davis that the map be sent to interested officials, it was so forwarded by United's representative in Las Vegas because he "felt it would be a matter of interest to our flight operations office." [32 Rep. Tr. 4401, 4397.] United's representative to whom the map (G. 57) was sent testified that the designation of the instrument area thereon was an Air Force designation and that he didn't know what it meant. And he never made any attempt to find out what the Air Force meant by the term. [33 Rep. Tr. 4586-4587.] No study was made of it. No attempt to obtain clarification was made. None of the information on the map was passed on to the pilots or to others at United. It was simply buried. [24 Rep. Tr. 3202-3203; 33 Rep. Tr. 4464-4466.] The National Director of Flight Safety and Assistant Vice-President of Flight operations [35 Rep. Tr. 4730] who never saw the map (G. 57) testified that if he had, he would

have wanted to get the facts with respect to the instrument area. [36 Rep. Tr. 4885-4887.] At a minimum, this evidence supports the conclusion by the jury that United had sufficient notice to require it, in the exercise of the highest degree of care which it owed to its passengers, to make inquiries concerning the types of flying going on in the Nellis area and particularly in the area marked "instrument" on G. 57.

Relying upon self-serving statements of United's representative and ignoring the evidence summarized above, United argues (U. Br. 68) that it was reasonable for United to assume that the KRAM procedure would not be flown without I.F.R. clearances. Aside from the failure of United to ascertain the meaning of the map furnished it and even if Colonel Davis had not indicated that instrument penetrations were being flown without I.F.R. clearances, there was other evidence from which such knowledge on the part of United could have been found by the jury. General Quesada, the first Administrator of the Federal Aviation Agency, testified that all segments of the aviation community do V.F.R. practice instrument flight training. [31 Rep. Tr. 4234, 4260-4261.] All over the United States at all military bases, there were practice penetrations without I.F.R. clearances, with a very large portion of such penetrations occurring on and over airways. [8 Rep. Tr. 1044-1045; 9 Rep. Tr. 1094-1106; 11 Rep. Tr. 1435-1438.] It was also a common practice followed by civilian as well as military pilots, including United pilots, to cancel I.F.R. flight plans and descend into an airport under V.F.R. rules. [40 Rep. Tr. 5376.]

B. The Knowledge of the Hazards in the Las Vegas-Nellis Area Placed the Duty Upon United to Take Action to Secure the Safety of Its Planes and Passengers Flying Through That Area.

United argues (U. Br. 67) that it was "under no duty to foresee and provide against casualties which are of a character not reasonably to be anticipated or which have not been known to happen." The issue on appeal is whether there was sufficient evidence for the jury to find as a fact that United was put on notice of the danger of collision between its planes and Air Force jets flying on or descending over the airway at or near the point of impact, and to take action to deal with the danger. United, a common carrier of passengers, required to exercise the higest degree of care with respect to its passengers, apparently contends that it was no breach of its duties to its passengers to ignore the facts that: (1) in the Las Vegas-Nellis area there was high density jet traffic on and over the airways creating rates of closure with commercial planes as high or higher than the rate of closure between the two planes involved in this accident; (2) these jets operated on the airway at all altitudes, flying level. ascending and descending; (3) the area in which the accident occurred was a particularly bad area; (4) there were irresponsible military flying and grave hazards of mid-air collision in the area; and (5) the instrument area on the map (G. 57) furnished by the Air Force indicated the probability of uncontrolled V.F.R. jet penetrations therein. United's view of the law is that this evidence was not sufficient to permit a jury to find a failure to use the highest degree of care. The authorities support a different conclusion.

Appellees have no quarrel with the proposition urged by United that it is not negligence to fail to provide against dangers which could not reasonably be anticipated. The application to the evidence in this case of that principle—and of its counterpart that it is negligence to fail to provide against dangers which the record overwhelmingly shows could reasonably have been anticipated—is another matter.

Three of the cases cited by United in which it was held that the foreseeability was absent involved conduct by passengers of a common carrier resulting in injury to other passengers. *Pruett v. Southern Ry. Co., supra,* 164 N. C. 3, 80 S. E. 65,[9] involving injury resulting from the throwing of a bottle by a passenger; *Thompson v. Monongahela Ry. Co.,* 99 W. Va. 207, 128 S. E. 110, involving the throwing of a tin cup; *Cary v. Los Angeles Ry Co.,* 157 Cal. 599, involving the giving of a starting signal (customarily given by the conductor) by one passenger while another was alighting. In *Stephens v. Oklahoma City Ry. Co.,* 28 Okla. 340, 114 Pac. 611, where the passengers passing from a street car to the sidewalk were struck because of the cold-blooded, deliberate and criminal conduct of a fire chief, said conduct was held not to be foreseeable. Finally, United cited *Morris v. Southern Pacific Ry. Co.,* 168 Cal. 485, 143 Pac. 708, where storm waters, against which a railroad took precautions in

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[9]The narrow compass of the rule relied on by United is well stated in this case cited by it:

> ". . . All of the courts and text-writers agree that mischief, which could by no reasonable possibility have been foreseen, and which no reasonable person would have anticipated, cannot be taken into account as a basis upon which to predicate a wrong." 164 N. C. 3 at 4, 80 S. E. 65, 75.

those areas where damage could be anticipated, undermined tracks, with no surface indication thereof, at a place where harm from storm waters had never previously occurred.

The Nevada rule relating to the obligation of common carriers has been set forth in *Forrester v. Southern Pacific Co.,* 36 Nev. 247, 134 Pac. 753, 773, as requiring a common carrier to exercise "the highest practicable degree of care that human judgment and foresight are capable of, to make its passengers' journey safe." See also, *Sherman v. S. P. Co.,* 33 Nev. 385, 412, 111 Pac. 416, 115 Pac. 909; *Valente v. Sierra Ry. Co.,* 151 Cal. 534, 543, 91 Pac. 481; *Treadwell v. Whittier,* 80 Cal. 574, 592-593.

The mere fact that this particular type of accident had never happened before in this area did not relieve United of its duty to foresee its likelihood. In *Rocca v. Tuolumne, etc. Electric Co.,* 76 Cal. App. 569, 245 Pac. 468, high tension electric wires were loosely hung near a tree, and a limb, broken in a storm, fell across them, causing a sag. In holding the defendant liable for the death of one coming in contact with them, although no limb of the tree had previously broken, the court said (583):

> "'. . . merely because a particular accident has not happened before does not render it of that class which may not "reasonably be anticipated," for if, in the conduct of a certain business, it should be known that unusual or uncommon danger must necessarily co-exist with certain conditions, responsibility attaches for a failure to control such conditions. And where injury could reasonably have been anticipated it is not a prerequi-

> site to liability that the wrongdoer should be able to anticipate the precise form of the consequential injury. Whether an injury should have been anticipated by defendant as the result of his negligent act depends upon the facts and circumstances of each particular case, and is ordinarily for the jury to determine.' See, also, *Teale v. Southern Pac. Co.,* 20 Cal. App. 570, [129 Pac. 949], where this rule is held to apply, even though no previous accident had occurred. . . ."

Even if the law were otherwise, the admissions of United in this case are completely inconsistent with its disclaimer of negligence in continuing to fly in the Las Vegas-Nellis area without taking any precautions. United argues that to hold it negligent for failure to obtain the facts with respect to flying procedures in the Las Vegas-Nellis area on the part of the Air Force would impose upon it "an onerous burden . . . far above and beyond even the high duty of care imposed upon a carrier in favor of its passengers." (U. Br. 68-69.) One of the many weaknesses in this contention is that United's own witnesses, the top officials of United, testified that no safety program was possible without carrying this "onerous burden." [38 Rep. Tr. 5104]

Officers of United responsible for flight safety testified that a safety program for an aircraft common carrier requires, first of all, the obtaining of all facts relating to possible hazards on the routes flown by its planes, and that it is inconsistent with such a program to guess or speculate or make assumptions. Factual information must be carefully gathered and carefully studied as the basic step towards safety in flight. [33

Rep. Tr. 4487-4488; 38 Rep. Tr. 5103-5105.] These precautions are "absolutely essential" to the proper functioning of a reasonable safety program. [38 Rep. Tr. 5110-5114, at 5114.] The facts required include information concerning the types of operations being conducted in various areas, the type of aircraft involved, their speed, the density of traffic, whether students are engaged in practicing in a particular area and, if so, the kind of flying in which they are engaged, whether the flying is with or without I.F.R. clearances and other information of a similar character, including particularly information concerning near misses. [33 Rep. Tr. 4514-4520; 36 Rep. Tr. 4848-4851.]

For a considerable period of time prior to the accident here involved, it had been known that the danger of mid-air collisions was increasing. The danger varied from locality to locality but the greatest hazards existed in places with a large volume of flying, high speed traffic and where training operations were being conducted; in consequence, the greatest hazards to be anticipated by United existed where, as in the Las Vegas-Nellis area, military air bases were located in the vicinity of commercial routes. [31 Rep. Tr. 4128-4129, 4132-4133; 33 Rep. Tr. 4514-4520; 35 Rep. Tr. 4742-4743, 4756-4757; 38 Rep. Tr. 5106-5108, 5118-5126.]

Despite United's knowledge not only that there was present in the Las Vegas-Nellis area all of the factors which ordinarily render flying hazardous but that in addition in this area irresponsible military flying was going on, United did not take a single step to obtain the specific facts which admittedly were necessary for devising any kind of a safety program. [34

Rep. Tr. 4640-4641; 36 Rep. Tr. 4855-4857; 38 Rep. Tr. 5126-5128.]

Although United officials admitted that in connection with a safety program, it was dangerous to rely on assumptions, United relied on numerous assumptions inconsistent with the facts concerning the Las Vegas-Nellis area: the assumption that planes from Nellis would fly in accordance with the directions of a prudent command which would not permit irresponsible flying [34 Rep. Tr. 4601-4602, 4632-4633]; that a prudent commander wouldn't engage in practice KRAM penetrations without obtaining I.F.R. clearances[10] [35 Rep. Tr. 4705-4706; 36 Rep. Tr. 4888-4889]; that Nellis had radio facilities off base which were the ones utilized for practice jet let-down [38 Rep. Tr. 5130-5132]; that only published procedures would be used for practice penetrations[11] [39 Rep. Tr. 5302]; that Air Force jets (which were commonly seen at all altitudes) would cross the airways at altitudes below seventeen thousand feet [24 Rep. Tr. 3315-3317], or that they would cross either below or above altitudes at which commercial planes ordinarily flew. [34 Rep. Tr. 4601.] Incredible as it may seem in the face of all of its knowledge to the contrary, United's Senior Vice-President, Mr. Petty, in charge

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[10]However, another high United official testified that he assumed that practice jet penetration might be done over airways without I.F.R. control. [38 Rep. Tr. 5135.]

[11]The utilization of unpublished procedures was a common practice throughout the industry and the witness who testified to the assumption had himself flown at least one such unpublished procedure. United was familiar with and itself utilized a number of such unpublished procedures [Exs. G. 146-154; 39 Rep. Tr. 5302; 46 Rep. Tr. 6097-6105]; at least one of these specifies the KRAM type of teardrop procedure; and it was common to use them all without I.F.R. clearances. [46 Rep. Tr. 6105-6106.]

of all of its flight operations, testified that United predicated its conduct in the area in question upon the assumption that Air Force planes were exercising a high degree of caution while they were on or over the airways. [38 Rep. Tr. 5135.]

C. United Negligently Failed to Establish and Implement Safety Measures Designed to Deal With the Hazards in the Las Vegas-Nellis Area.

The manner in which United pigeon-holed the information that it did have would support a finding of gross negligence, let alone the failure to use the highest degree of care imposed by law in this case. For example, the Flight Manager at Denver who had the responsibility of briefing crews that flew through the area where the accident occurred was not even informed that there was irresponsible military flying going on in the Las Vegas-Nellis area or that it was a particularly bad area from the standpoint of the hazard of mid-air collisions. Accordingly, he was in no position to convey this information to the crews briefed by him, which included crew members of the DC-7 involved in the collision. [40 Rep. Tr. 5355-5356, 5343-5344, 5361, 5366, 5378-5379.]

The failure to do anything more than report near misses in the area to the C.A.A., the fact that there was no follow-up to discover the causes of the near misses or how the hazards which they represented could be eliminated, the lack of information of some key officials dealing with safety concerning some of the near misses and the general casual approach amounting virtually to indifference (except for reporting incidents to the C.A.A.) constitute a long story in itself, the details of which would unnecessarily burden

this brief. The record, however, clearly supports on this score also a finding of United's negligence. [Exs. G. 82-84, 89; U. 80 A-L, 81; P. 5, 6; 4 Rep. Tr. 515-517; 24 Rep. Tr. 3254-3256; 33 Rep. Tr. 4476-4479, 4496, 4542-4576; 38 Rep. Tr. 5081-5086, 5129, 5146-5153; 39 Rep. Tr. 5264-5272, 5308-5320; 40 Rep. Tr. 5325-5334.]

Even where the Air Force attempted to warn the pilots of United of the hazards prevalent in the Las Vegas-Nellis vicinity, United participated in preventing these warnings from being given. One of the functions of a Regional Airspace Sub-Committee, composed of both civilian and military members, was to determine what areas should be designated as caution areas on maps utilized by pilots. The Air Force proposed in 1957 that certain areas not so designated in the Las Vegas-Nellis vicinity be so marked on maps; the commercial carriers including United opposed this being done because it involved too much air space and interfered with the expansion of the airways system. It was conceded, however, by United that the failure to designate these areas as caution areas would not eliminate the hazards but would merely result in failing to warn pilots thereof. [Ex. G 53, pages 22 *et seq.*, 35 Rep. Tr. 4713-4717; 38 Rep. Tr. 5157-5160.] General Quesada testified and it was conceded by United that the presence of caution areas on maps utilized by their pilots was important and that its pilots were not informed of the proposed caution areas which United opposed. [31 Rep. Tr. 4231-4233; 38 Rep. Tr. 5154-5155.]

United, in addition to opposing others furnishing the information, itself took no steps to caution its

pilots of the hazards in the Las Vegas-Nellis area. [24 Rep. Tr. 3228, 3241-3243, 3246; 25 Rep. Tr. 3356-3358; 40 Rep. Tr. 5378-5379.] United concedes that it has a duty to warn pilots to exercise caution in those areas where hazards exist and that this is a very important part of any safety program and, in principle at least, a vital part of United's program. Such warnings serve to alert the pilots and to cause them to concentrate on scanning for the purpose of avoiding collisions. [24 Rep. Tr. 3244-3246; 30 Rep. Tr. 4058; 33 Rep. Tr. 4493-4495; 38 Rep. Tr. 5104-5105, 5113.]

A publication of United, known as "Cockpit," was used to disseminate information regarding hazards in flight. [30 Rep. Tr. 4050-4051.] For example, it published the fact that take-offs or landings occurred in Chicago—one of the busiest airports in the world—every 82 seconds. [33 Rep. Tr. 4498.] Yet United did not utilize "Cockpit" to publicize to its pilots the fact that during the weekday daylight hours, take-offs and landings at Nellis occurred about twice as often as in Chicago. [Ex. G 53; 33 Rep. Tr. 4482-4484, 4500-4501.] Admittedly, the only instructions given to United pilots flying the route on which the disaster occurred were to file a detailed flight plan with, and obtain an air traffic clearance from the C.A.A. [4 Rep. Tr. 504.]

Although it was recognized that inattention for only a fraction of a second represented the difference between life and death, pilots were allowed to eat meals and drink coffee during the twenty minutes that they were flying through the Las Vegas-Nellis area; there was no prohibition against smoking nor against doing

paper work during that period; there was no direction to stewardesses to stay out of the cockpit or to members of the crew not to leave the cockpit; pilots were not told that they should exercise extreme caution or to be more alert while flying through the one hundred mile area where hazardous high speed jet traffic was so prevalent; there was not even a suggestion to the crew that they might possibly slow down a little during that hazardous portion of the flight. [24 Rep. Tr. 3302-3304.][12] United's national office know that no special instructions were being given to the pilots concerning the Los Vegas-Nellis area. [36 Rep. Tr. 4894.]

The evidence affords the basis for a strong inference as to one of the factors of distraction of the United

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[12]To Mr. Larned, United's manager of flight operations:

Q. You realized, did you not, that particularly where in an area where there were high speed jets flying and flying in an irresponsible manner the inattention of a pilot for a second could mean the difference between life and death; you knew that, didn't you? A. It could under certain circumstances, yes.

Q. But you knew that where there was irresponsible jet military flying going on that the hazard of that, of terrible consequences resulting from a momentary inattention were very great? A. I think it could be. There could be a situation where the hazard would be very great.

Q. And you knew that prior to April 21, 1958, did you not? A. Yes, sir.

Q. You knew, for example, that the time that it takes to light a cigarette could mean the difference between avoiding a collision and having one? A. It could, yes, sir.

Q. But you didn't tell your pilots not to smoke cigarettes in that area, did you? A. No, sir.

Q. You knew also that the time that it takes to take a sip of coffee could also mean the difference between a collision and avoiding one? A. Yes, sir.

Q. But you didn't tell your pilots not to drink coffee or to eat in that area, did you? A. No, sir.

Q. You knew, did you not, that it was the custom of your pilots to be served while they were sitting in their seats? A. Yes, sir." [33 Rep. Tr. 4536-4537.]

pilots prior to the collision. There was discovered in the wreckage of the DC-7 charred and burned portions of a manual outside of the leather case in which it was ordinarily carried except when being utilized.[13] Experience has established that pilots have a tendency at times when they should be devoting all of their time to scanning to do paper work and this, like any other diversion, prevents the pilot from being as alert as possible and from devoting all of the time possible to outside scanning, which is required when flying through an area where hazards exist. [Ex. G. 71; 24 Rep. Tr. 3295-3296.]

The negligence of United is further underscored by the fact that in this highly hazardous area with its high volume of jet traffic and irresponsible flying the map furnished the pilots by United did not indicate continuous jet training there but, to the contrary, shows the airway at the place of the accident "to be free and unrestricted"; a United pilot flying there would be led by United's map to expect "normal air traffic." [4 Rep. Tr. 506.]

It is admitted that United never requested any information of any kind either from C.A.A. or the Air Force regarding flights of military aircraft in the vicinity of Nellis Air Force Base from any United States employee, nor was any person assigned by United to obtain such information. [5 Rep. Tr. 540-542; 24 Rep. Tr. 3254; 33 Rep. Tr. 4548-4550.] The excellent relationship that existed between United and the Air

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[13]Although the witness did not remember whether the pages were in a kit, he does remmber seeing the charred pages and he does not recall removing them from a kit or briefcase. [39 Rep. Tr. 5297-5298.]

Force tends to compound the negligence of United in failing to contact the Air Force for the purpose of obtaining information concerning the character of the flying operations in the Las Vegas-Nellis complex in order to find means of eliminating the irresponsible flying and hazardous conditions existing in that area. Two of the top officers of United were generals in the Air Force Reserve. [38 Rep. Tr. 5169.] United officials participated in Air Force meetings relating to flight safety matters, assisted the Air Defense Command in setting up a flight safety program and gave lectures on safety to Air Force officers, all of which created a situation in which the Air Force was quite cooperative in conferring with United for the purpose of making flying conditions safe for the users of the airways. [36 Rep. Tr. 4791-4792; 40 Rep. Tr. 5345.]

United had made a practice of taking up specific safety problems directly with the Air Force. Prior to the accident here involved meetings were held resulting in the solution of such problems with respect to areas other than Las Vegas-Nellis. [24 Rep. Tr. 3225-3227; 35 Rep. Tr. 4694-4696; 38 Rep. Tr. 5149-5150; 39 Rep. Tr. 5248-5251.] The failure of United officials and employees to investigate the reports of irresponsible military flying by getting the facts concerning the nature of that flying, making necessary complaints and then following up to see to it that something was done about the complaints was a violation of United's own policies with respect to its own safety program. [38 Rep. Tr. 5112-5114.][14] United did not

[14]United's Vice President Petty testified:

"Q. You wouldn't stop, would you, sir, with simply making a complaint; wouldn't you follow up on that

even consider conducting its operations in this "lethal" area any differently than in any other area. [34 Rep. Tr. 4637.]

There is no doubt that if United had requested information from and cooperation by Nellis, it would have received it. [20 Rep. Tr. 2673-2674.] In fact, after the accident it was the general in command of Nellis who called a meeting of Air Force and commercial company representatives for the purpose of disseminating full information concerning Nellis operations, which information he had assumed the commercial airlines had prior to the accident. United, which sent a "pretty good sized contingent" to the meeting, expressed its deep appreciation of the Air Force's "sincere interest and cooperation in helping to solve the serious air traffic control problem" in the Las Vegas-Nellis area. [Exs. P. 3, 4; 20 Rep. Tr. 2684-2692; 35 Rep. Tr. 4695-4696.]

If United had investigated the procedures being followed at Nellis and had protested the use of the KRAM procedure, the complaint would have been investigated by the Air Force and if it had found it feasible to make a change to eliminate the hazard, that would

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complaint to see to it that something was done about it? A. Yes, sir.

Q. Now, it is true, is it not, that this entire program of action that I have outlined [obtaining the facts, making complaints and following up on the complaints to secure action] is absolutely essential to a proper functioning of a reasonable safety program, is it not? A. Yes, sir.

Q. And you would expect everyone in your organization having any concern with safety to take the kind of action you have indicated if they know about the kinds of [irresponsible] flying described in a particular area, isn't that correct, sir? A. That is correct.

Q. That would be company policy, would it not, sir? A. Yes, sir." [38 Rep. Tr. 5113-5114.]

have been done. [10 Rep. Tr. 1278-1279.] That such precautions were feasible is demonstrated by the fact that immediately after the accident, they were taken by providing that the KRAM procedure would penetrate the airway only at points above and below the altitudes utilized by through commercial traffic. [20 Rep. Tr. 2609-2611.] If this had been accomplished before rather than after April 21, 1958, there would have been no collision.

The fact that there was no training or instruction of pilots with respect to division of scanning responsibilities so as to assure the coverage of the widest possible area in the shortest possible time was itself a sufficient basis for a finding of negligence by the jury. [25 Rep. Tr. 3294-3295; 36 Rep. Tr. 4894-4895.]

Any reduction in the speed of the DC-7 would have increased the opportunity of the pilots of the two planes to take whatever action was necessary to avoid a collision—and it made no difference whether that reduction in speed was on the part of the DC-7 or of the jet. [10 Rep. Tr. 1302; 29 Rep. Tr. 3916.] United never even gave any consideration to decreasing the rate of speed at which its planes flew through this area in which it knew there was a lot of irresponsible military flying going on, even though this had been suggested as one means of dealing with hazards resulting in part from high speed traffic. [34 Rep. Tr. 4613-4616.]

United correctly compares the operation of the government jet to the driving of an automobile along a crowded street maintaining a high rate of speed until it is too late to avoid an accident, or to persistence in driving over a mountain road with frequent curves

at an excessive rate of speed. (U. Br. 45-46.) These excellent analogies apply with equal force to the conduct of United. It persisted in operating the DC-7 at a high rate of speed in an area which was highly hazardous, until a collision resulted. Like conduct on the part of the Government is described by United as "reckless or wilful misconduct." Certainly on the part of United, it at least fails to meet the high degree of care which the law imposes upon it with respect to its passengers.

IV.

The District Court Correctly Instructed the Jury That the Appellees Were Entitled to the Benefits of the Res Ipsa Loquitur Doctrine Against United.

The District Court gave an instruction that *res ipsa loquitur* applied to United as a common carrier, which instruction, in pertinent part, is accurately set forth by United. (U. Br. 70.)

United contends that it was error for the District Court to give this instruction at all, arguing that Nevada law, asserted to be applicable here, does not extend the doctrine to a collision case, even when the action is by a passenger against a carrier. United contends further that the District Court also erred in refusing to instruct that, if the doctrine had applicability, it became operative only in the event the jury found that United was in exclusive control of the instrumentality causing the accident. (U. Br. 71-72.)

United concedes that the instruction was correct as a matter of California law because California applies *res ipsa* in favor of passengers against carriers in collision cases, and that California has abandoned the

requirement of exclusive control of the instrumentality causing the injury as a condition of applying *res ipsa.* (U. Br. 72-73.) Appellees submit that California law is the applicable state law on the doctrine of *res ipsa loquitur,* and that in addition the instruction given by the District Court is correct as a matter of Nevada law.

A. The Law of California Is Controlling on the Question of the Applicability of the Doctrine of Res Ipsa Loquitur to the Instant Cases.

Federal jurisdiction in the instant cases is based upon diversity of citizenship under 28 U. S. C. §1332(1). Since the federal court was sitting in California in the *Wiener* cases, it must apply California law on any issue that may significantly affect the result of the litigation. *Erie R. Co. v. Tompkins,* 304 U. S. 64; *Guaranty Trust Co. v. York,* 326 U. S. 99, 109. Under the *Erie* rule, it has been held that the doctrine of *res ipsa loquitur* sufficiently affects the outcome of the litigation to require the federal courts to follow the state rule. *Lobel v. American Airlines, Inc.* (C. A. 2, 1951), 192 F. 2d 217, *cert. den.* 342 U. S. 945; *Estepp v. Norfolk & W. Ry. Co.* (C. A. 6, 1951), 192 F. 2d 889; *Lachman v. Pennsylvania Greyhound Lines* (4th Cir. 1947), 160 F. 2d 496; *Smith v. Pennsylvania Central Airlines* (D.C. D.C. 1948), 76 F. Supp. 940.

The District Court was required to determine whether it should give a *res ipsa* instruction as though the cases were being tried in a California state court. *Guaranty Trust Co. v. York,* 326 U. S. 99, 109-110; *Erie R. Co. v. Tompkins, supra,* 304 U. S. at 109. Accordingly, the District Court was required to follow the conflict of laws rules prevailing in California.

Klaxon Co. v. Stentor Electric Mfg. Co., 313 U. S. 487; *Jones v. Weaver* (9th Cir. 1941), 123 F. 2d 403, 406. The first question, therefore, is whether, if the cases had been tried in a California state court, that court would have applied the law of California or the law of Nevada on the *res ipsa* doctrine. See, *e.g., Sampson v. Channell* (1st Cir. 1940), 110 F. 2d 754, 759, *cert. den.* 310 U. S. 650; *Sylvania Electric Prods., Inc. v. Barker* (C. A. 1 1955), 228 F. 2d 842, 849, *cert. den.* 350 U. S. 988.

The California Supreme Court has stated the California conflict of laws rule in tort cases as follows:

> ". . . In actions on torts occurring abroad, the courts of this state determine the substantive matters inherent in the cause of action by adopting as their own the law of the place where the tortious acts occurred, unless it is contrary to the public policy of the state. . . . But the forum does not adopt as its own the procedural law of the place where the tortious acts occur. . . ." *Grant v. McAuliffe,* 41 Cal. 2d 859, 862, 264 P. 2d 944, 946.

And see *Wilson v. Lockheed Aircraft Corp.,* 210 Cal. App. 2d 451, 26 Cal. Rptr. 626; *Victor v. Sperry,* 163 Cal. App. 2d 518, 329 P. 2d 728, *hearing den.; McMillen v. Douglas Aircraft Co.* (S. D. Cal.), 90 F. Supp. 670, 672; *Cf. Gordon v. Reynolds,* 187 Cal. App. 2d 472, 10 Cal. Rptr. 73, *hearing den.; Restatement, Conflict of Laws,* §585.

In determining whether a question is procedural or substantive for conflict of laws purposes, the court of the forum looks to its own law, not to the law of

the place where the cause of action arose. *Grant v. McAuliffe,* 41 Cal. 2d 859, 863-867, 264 P. 2d 944, 946-949; *Biewend v. Biewend,* 17 Cal. 2d 108, 109 P. 2d 701; *Miller v. Lane,* 160 Cal. 90, 116 Pac. 58; *Klaxon v. Stentor Electric Mfg. Co.,* 313 U. S. 487, 496-497; *Sampson v. Channell* (1st Cir. 1940), 110 F. 2d 754, 759, *cert. den.,* 310 U. S. 650; *Sylvania Electric Prods. Inc. v. Barker* (C. A. 1, 1955), 228 F. 2d 842, 849, *cert. den.,* 350 U. S. 988; *Lobel v. American Airlines, Inc.* (C. A. 2, 1951), 192 F. 2d 217, 219, *cert. den.,* 342 U. S. 945; *Moran v. Pittsburgh-Des Moines Steel Co.* (3rd Cir. 1948), 166 F. 2d 908, 910, *cert. den.,* 334 U. S. 846; *McMillen v. Douglas Aircraft Co.* (S.D. Cal.), 90 F. Supp. 670, 672; *Restatement, Conflict of Laws,* §584.

California, as United concedes (U. Br. 73) regards the doctrine of *res ipsa loquitur* as a procedural rule of evidence, one which gives rise to an inference of negligence under certain circumstances. *Ybarra v. Spangard,* 25 Cal. 2d 486, 489, 154 P. 2d 687, 689; see, also, *Orr v. Southern Pac. Co.* (C. A. 9 1955), 226 F. 2d 841, 843; *Pacific Tel. & Tel. Co. v. City of Lodi,* 58 Cal. App. 2d 888, 895, 137 P. 2d 847, 850; *Sloboden v. Time Oil Co.,* 145 Cal. App. 2d 197, 201, 302 P. 2d 34, 36.

California follows the settled rule of *Restatement, Conflict of Laws,* §595, that the law of the forum governs the proof of the facts alleged and also determines presumptions and inferences are to be drawn from evidence. *Pfingsten v. Westenhaver,* 39 Cal. 2d 12, 244 P. 2d 395; *Hamlet v. Hook,* 106 Cal. App. 2d 791, 794, 236 P. 2d 196, 197; *Estate of Winder,* 98 Cal. App. 2d 78, 219 P. 2d 18, 24, *hearing den.* In the *Pfing-*

sten case, as in the *Hamlet* and *Winder* cases, §595 of *Restatement* was cited with approval. Also see, *Tevis v. Pitcher,* 10 Cal. 465, 478-479.

It is therefore beyond question that the California courts would apply the California rule on the doctrine of *res ipsa loquitur* in cases arising under the wrongful death statute of Nevada.

United, in its brief, contrives an elaborate argument that the Nevada rule on *res ipsa* governs, but this argument breaks down at three critical points:

1. United falls victim to the "tyranny of labels", to borrow a famous aphorism, in its attempt to establish the applicability of the Nevada law of *res ipsa loquitur* here. United makes the old error of assuming that the labels "substance" and "procedure" have universal meanings for all purposes. United cites the *Erie* case as authority for the proposition that sufficiency of the evidence to establish a cause of action is a matter of underlying substantive law, presumably for all purposes. (U. Br. 75 footnote, and 78.)

The courts have long since recognized that the classifications "substantive" and "procedural" may vary with different usages. What may be classified as "substantive" for the purpose of applying local law under the *Erie* rule may be classified as "procedural" for conflict of laws purposes under state law. See, *e.g., Lobel v. American Airlines, Inc.* (C.A. 2 1951), 192 F. 2d 217, *cert. den.* 342 U. S. 945, and *Sampson v. Channell* (1st Cir. 1940), 110 F. 2d 754, *cert. den.* 310

U. S. 650. The point was made clearly by the Supreme Court in discussing these terms in a diversity case involving no conflict of laws question:

> "It is . . . immaterial whether statutes of limitation are characterized either as 'substantive' or 'procedural' in State court opinions in any use of those terms unrelated to the specific issue before us. *Erie R. Co. v. Tompkins,* was not an endeavor to formulate scientific legal terminology. . . ." *Guaranty Trust Co. v. York,* 326 U. S. 99, 109. See, also, *Black Diamond Steamship Corp. v. Robert Stewart & Sons, Ltd.,* 336 U. S. 386, 397.

The California Supreme Court, speaking in a leading conflict of laws case, indicated that California would determine for itself the classification of the problem:

> ". . . [a] statute or other rule of law will be characterized as substantive or procedural according to the nature of the problem for which a characterization must be made." *Grant v. McAuliffe,* 41 Cal. 2d 859, 865, 264 P. 2d 944, 948. United's resort to *Erie* authorities to argue that *res ipsa loquitur* is inherently a matter of underlying substantive law for conflict of law purposes demonstrates the ultimate futility of United's position.

2. In its statement of the issue, United makes a second fallacious assumption that is fatal to the entire argument. It is that California conflict of laws principles require the Court to look to Nevada law to determine whether the question is substantive or procedural. United cites absolutely no authority which supports this assumption, and for good reason. There is

no such authority; the assumption is simply erroneous.[15]

The question whether *res ipsa* should be classified as procedural or substantive for choice of law purposes is a question of California law, as *Grant v. McAuliffe* and the other authorities cited *supra,* make plain. The rule is clearly stated in *Restatement, Conflict of Laws,* §584:

> "The court of the forum determines according to its own Conflict of Laws rule whether a given question is one of substance or procedure."

United's argument, therefore, never gets off the ground.

3. After assuming, incorrectly, that California will look to Nevada law to determine if *res ipsa* is procedural or substantive for conflicts purposes, United asserts that Nevada has not spoken on the subject. (U. Br. 74.) United then relies upon two federal cases to support its argument that Nevada would classify *res ipsa* as substantive, and that California would follow this classification by Nevada. These are the cases of *Lachman v. Pennsylvania Greyhound Lines* (4th Cir. 1947), 160 F. 2d 496, and *Smith v. Pennsylvania Central Airlines Corp.* (D.C. D.C. 1948), 76 F. Supp. 940. As will be established below, it is quite possible to determine what Nevada law is from Nevada cases and

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[15]United cites three cases in this portion of its brief (U. Br. 74), *Ryan v. North Alaska Salmon Co.,* 153 Cal. 438, 95 Pac. 862; *Loranger v. Nadeau,* 215 Cal. 362, 10 P. 2d 63; and *McManus v. Red Salmon Canning Co.,* 37 Cal. App. 133, 173 Pac. 1112. All three cases involve matters considered substantive under California law and the law of the situs was therefore held applicable. In the *Ryan* and *McManus* cases the issue related to whether a cause of action for wrongful death existed; in *Loranger* it was whether ordinary or gross negligence applied to liability for injuries to a guest.

it is not necessary to resort to two cases having nothing to do with Nevada law.

Moreover, these two cases are in irreconcilable conflict with the law as declared by the Supreme Court in the *Erie* and *Klaxon* cases.

The *Lachman* and *Smith* cases are similar to the instant cases in that tort actions arising in one state were brought in district courts in other states. The failing of both cases is that the courts made their own independent judgments whether *res ipsa* was procedural or substantive for conflicts purposes,[16] rather than deciding that question by reference to the law of the jurisdiction in which they sat.[17] In failing to look to the local conflicts rule to determine whether *res ipsa* was procedural or substantive, the courts in the *Lachman* and *Smith* cases violated the clear ruling of the *Klaxon* case:

> "We are of opinion that the prohibition declared in *Erie R. Co. v. Tompkins,* 304 U.S. 64, . . . against such independent determinations by the federal courts extends to the field of conflict of laws. . . ." 313 U. S. 487, 496.

The *Lachman* and *Smith* cases have been justly criticized. In 21 A. L. R. 2d 247, 260, for example, it is stated:

> "In a few cases [including *Lachman* and *Smith*] the significance of the problems discussed above has not been recognized. In these cases the

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[16]Thus, these two cases are contrary to United's own position that in determining what is procedural, it is necessary to look in the first instance to the conflict of laws principles of the forum state.

[17]Interestingly, *Smith's* only authority for its method of handling the question was the *Lachman* case.

> courts, after stating that a question, as one of substance, is controlled by local law, apply the local rules of conflict of law in matters of substance, without considering whether the question is, in fact, classified as one of substance or procedure under these rules."

In contrast with the *Lachman* and *Smith* cases, the case of *Lobel v. American Airlines, Inc.* (C.A. 2 1951), 192 F. 2d 217, *cert. den.* 342 U. S. 945, represents a correct approach to the conflict of laws question with reference to *res ipsa loquitur.* In *Lobel,* a tort cause of action arising in Indiana was tried by a federal district court in New York. The District Court gave an instruction on *res ipsa loquitur* which was based upon Indiana law, but was in conflict with the New York rule on the subject. On appeal, the Court of Appeals for the Second Circuit reversed the District Court, holding that under the New York conflicts rule, *res ipsa* was classified as a procedural matter governed by the law of the forum. The Second Circuit correctly interpreted the *Erie* and *Klaxon* cases as follows:

> "Although the accident occurred in Indiana, we think the rule the same because the New York courts, as we interpret their decisions, would regard *res ipsa loquitur* as a matter of procedure to be controlled by the legal rules of the forum. . . ." 192 F. 2d at 219.

Cf., Estepp v. Norfolk & W. Ry. Co. (C.A. 6 1951), 192 F. 2d 889; see, also, *Sylvania Electric Prods., Inc. v. Barker* (C.A. 1, 1955), 228 F. 2d 842, 849.

Here the law of the forum accords with the instruction given on *res ipsa.* The complaint that error was committed is accordingly without merit.

B. Even if Nevada Law Governed the Applicability of the Doctrine of Res Ipsa Loquitur, the District Court's Instructions Would Not Have Been Error.

United contends that, because the accident was not caused by an instrument in its exclusive control, the District Court's instructions on the doctrine of *res ipsa loquitur* were error under the law of Nevada. (U. Br. 73, 79-80.) Appellees submit that United has misinterpreted the law of Nevada.

In the case of *Nyberg v. Kirby,* 65 Nev. 42, 188 P. 2d 1006, relied upon by United, the Nevada Supreme Court was not required to decide whether the showing of exclusive control was an essential requirement. In that case, the vehicle that caused the accident was in fact under the defendant's sole control, so the question was not in issue. This is also true of the case of *Garibaldi Bros. Trucking Co. v. Waldren,* 74 Nev. 42, 321 P. 2d 248.

The law of Nevada on the doctrine of *res ipsa* as declared in cases involving the single instrumentality question is similar to the law of California in that the doctrine has been applied where there has been no showing that the tort was caused by an instrumentality in the sole or exclusive control of the defendant. In *Sherman v. Southern Pac. Co.,* 33 Nev. 385, 111 Pac. 416, the Nevada Supreme Court held that *res ipsa* applied in favor of a passenger against a common carrier, even though circumstances not within the carrier's control, such as a slide, may have caused the accident. The Court noted that ". . . The maxim, '*Res ipsa loquitur*', has a peculiar application to this class of cases [common carrier cases]." 33 Nev. at 393; 111 Pac. at 419.

Moreover, in the case of *Las Vegas Hospital Ass'n v. Gaffney,* 64 Nev. 225, 180 P. 2d 594, the Nevada Supreme Court held that the doctrine applied in favor of a patient against a hospital even though both the instrumentality causing the plaintiff's injuries and the person controlling the instrumentality were unknown. *Ybarra v. Spangard, supra,* 25 Cal. 2d 486, 154 P. 2d 687, was cited as authority. The Nevada Supreme Court's citation of *Ybarra v. Spangard* in the *Las Vegas Hospital Ass'n* case indicates that the law of Nevada is the same on this issue as the law of California and as the law of a growing majority of other jurisdictions.

In *Capital Transit Co. v. Jackson* (C.A. D.C. 1945), 149 F. 2d 839, 840-841, eleven jurisdictions (Colorado, Illinois, Indiana, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Pennsylvania, Virginia and Wyoming) were listed as following the rule that *res ipsa loquitur* could not establish a common carrier's negligence in a passenger's suit arising out of a collision with another vehicle. On the other hand, the Court listed thirteen states (Arizona, Arkansas, California, Iowa, Kansas, Kentucky, Louisiana, Missouri, New Jersey, New York, Oklahoma, Rhode Island and West Virginia) as holding that proof of collision was sufficient to create a *prima facie* case of negligence against the carrier. The *Capital Transit* holding was in accord with majority. Since 1945 when the *Capital Transit* case was decided, three other jurisdictions (Delaware, Illinois and Montana) have adopted the majority rule that *res ipsa* does apply in a common carrier collision case. *Delaware Coach Co. v. Reynolds,* 45 Del. 226, 71 A. 2d 69; *Townsend v. Chicago Transit*

Authority, 1 Ill. App. 2d 77, 116 N. E. 2d 170; *Krueger v. Richardson,* 326 Ill. App. 205, 61 N. E. 2d 399; *Whitney v. Northwest Greyhound Lines,* 125 Mont. 528, 242 P. 2d 257.

Since the *Capital Transit* decision, four additional jurisdictions (Colorado, Pennsylvania, Texas and Vermont), including two previously in the minority listed above, have held on facts not involving a common carrier that exclusive control is not an essential element of *res ipsa. La Rocco v. Fernandez,* 130 Colo. 523, 277 P. 2d 232; *Loch v. Confair,* 372 Pa. 212, 93 A. 2d 451; *Landers v. East Texas Salt Water Disposal Co.,* 151 Tex. 251, 248 S. W. 2d 731; *Joly v. Coca-Cola Co.,* 115 Vt. 174, 55 A. 2d 181.

Dean Prosser, in his 1955 treatise on torts, does not list exclusive control of the injury-causing instrumentality as a requirement of *res ipsa loquitur* and states, "It would be far better, and much confusion would be avoided, if the idea of 'control' were discarded altogether. . . ." Prosser, *Torts,* §42, at pp. 199, 206 (2d ed. 1955).

V.

The Findings of the District Court That the Air Force Jet Pilots Negligently Failed to Yield the Right-of-Way to the DC-7 and Otherwise Negligently Operated the Jet Are Supported by Substantial Evidence.

The Government (G. Br. 50, *et. seq.*) contends that there is no substantial evidence to support the findings of pilot negligence proximately contributing to the mid-air collision. The Government is unquestionably correct in its assertion that the Air Force jet was engaged in an evasive maneuver at the time of the col-

lision. However, the conclusion that it draws therefrom to effect that this establishes a lack of negligence—does not follow. The duty imposed upon the pilots was to operate their plane in such a manner as to avoid a collision. The fact that the pilots were able to institute evasive action but were unable to avoid a collision hardly renders impermissible a finding of negligence on the part of the pilots.

The Government makes much the same vague argument as United with respect to the rate of closure between the two planes and the supposed reaction time required to avoid a collision. This has been dealt with, *supra,* pages 15-20, where the substantial evidence supporting a contrary conclusion is summarized. Moreover, it is undisputed that the United plane was flying at a place and in a manner reasonably to be anticipated. Accordingly, the Government is faced with the following dilemma. Either the pilots of the Air Force jet were negligent because they failed to take the action necessary to avoid a collision or they were negligently flying their plane in such a manner that it was not possible for them to avoid colliding with other planes flying in a manner and at places reasonably to be anticipated by them.

A pilot may not successfully disclaim negligence in failing to yield the right-of-way on the ground that he has rendered compliance with the right-of-way rules impossible by reason of the manner in which he flew his plane. *United States v. Miller* (C. A. 9 1962), 303 F. 2d 703. It is undisputed that the DC-7 had the right-of-way, and that the Air Force jet failed to yield the right-of-way to the DC-7. From these undisputed facts, the Court found negligence on the part

of the Government. (F. 41; G. Br. App. A 14.) This finding standing alone is sufficient to support the judgment against the Government.[18]

The duty of the observer pilot on the jet as set forth in Air Force regulations (Training and Operations Memorandum No. 51-8) provides that "all pilots practicing instrument flying must have an alert observer at all times to *insure* clearance with other aircraft and cloud formations." (G. Br. App. E 1, Item 3.c. (emphasis added).) The failure of the observer to insure clearance constituted a breach of the Government's own regulations affording ample basis for a finding of negligence.

It is admitted that the jet pilots had the duty of conforming to C.A.A. (Civil Aeronautics Authority) as well as Air Force regulations. [5 Rep. Tr. 561.] As has been noted, C.A.R. (Civil Air Regulations) 60.14 required that the jet not be operated in such proximity to any other plane as to create a collision hazard. That this regulation was violated is, of course, obvious.

No factor other than speed has ever been asserted to have interfered with the ability of the jet pilots to see and avoid the DC-7. The Government admitted that at the speed called for by the KRAM procedure, the pilots could see and avoid a collision. [5 Rep. Tr. 601-602, 608-609.] Accordingly, the admitted facts alone are sufficient to establish pilot negligence against the Government.

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[18]The failure of United's plane to take any evasive action is, as the Government contends, evidence of negligence on the part of its pilots but this failure in no wise serves to exonerate the Government with respect to the negligence of the Air Force pilots. [F. 44; G. Br. App. A 14-15.]

VI.

The Findings and Conclusions of the Trial Court That the Establishment and Manner of Operation of the KRAM Procedure in a Negligent Manner Did Not Fall Within the Discretionary Function Exception of the Tort Claims Act Are Consistent With Both the Evidence and The Law.

A. The Discretionary Function Exception Under the Tort Claims Act Relates to Activities Involving the Making of Policy.

The principal authority relied upon by the Government in urging the discretionary function defense is *Dalehite v. United States,* 346 U. S. 15, in which great emphasis was placed upon the element of discretion as being fundamental to this exception. Perhaps the key words in that opinion delineating what is meant by discretion are:

> "Where there is room for *policy* judgment and decision there is discretion." 346 U. S. at 36 (emphasis added).

The terms "policy judgment and decision" are used conjunctively. It is the exercise of judgment and decision-making related to policy matters which brings the discretionary function exemption into play. This proposition, set forth as basic in *Dalehite,* renders the discretionary function defense inapplicable to the facts of this case.[19]

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[19]Accordingly it is not necessary to explore the extent to which *Dalehite* has been modified by subsequent decisions. See, *Indian Towing Co. v. United States,* 350 U. S. 61; *Rayonier, Inc. v. United States,* 352 U. S. 315; *Fair v. United States* (C. A. 5, 1956), 234 F. 2d 288; *American Exchange Bank v.*

Central to the point under discussion is the fact that the tort here involved is predicated upon the negligent operation of an airplane. There are no cases holding that negligence of this kind falls within the ambit of the discretionary function exemption. There are many cases to the contrary. Thus, where airplanes are controlled from the ground in a negligent manner the discretionary function exemption does not apply to such negligent ground control. *United States v. Union Trust Co.* (C.A. D.C., 1955), 221 Fed. 62; *Dahlstrom v. United States* (C.A. 8, 1956), 228 F. 2d 819.

The fact that an accident was caused by the operation of a military installation essential to national security does not automatically render the discretionary function exemption applicable. Thus an uninsulated transmission line which is part of a military radar site may constitute a basis for liability of the Government under the Tort Claims Act. *McCormick v. United States* (D.C. Minn., 1958), 159 F. Supp. 920, appeal dismissed 257 F. 2d 815 (C.A. 8, 1958). There seems to be no reasonable distinction between a failure to take precautions with respect to the installation of a transmission line on the one hand and the failure to take such precautions in establishing flight procedures for government airplanes. The taking of reasonable precautions in connection with the manner in which planes are flown is not a matter which the law intended to commit generally to the discretion of government personnel.

United States (C. A. 6, 1958), 257 F. 2d 938; *Lack v. United States* (C. A. 8, 1958), 262 F. 2d 167, 169-170; *United States v. Hunsucker* (C. A. 9, 1962), 314 F. 2d 98, 104, and see particularly the oral opinion of Judge Hall, 55 Rep. Tr. 7428-7440.

B. The Execution of Policy Decisions as Laid Down in Plans or Regulations Is Not Insulated From Liability for Negligence by the Discretionary Function Exemption.

As a detailed examination of the findings, *infra,* will reveal, the negligence of the Nellis staff in establishing and maintaining the KRAM procedure involved largely the violation of Air Force Regulations relating to safety. The Government points out (G. Br. 29) that *Dalehite* declares ". . . that acts of subordinates in carrying out the operations of government *in accordance with offical directions* cannot be actionable." 346 U. S. at 36 (emphasis added). The other side of the coin is that where regulations with respect to safety are ignored or are not executed "in accordance with official directions" the discretionary function rule may not be invoked as a defense. Obviously no discretion is vested in subordinates to act otherwise than *in accordance with official directions.* In *Dalehite,* the discretionary function exemption was held to apply precisely because each act of claimed negligence was directed by and carried out in accordance with the plan which itself resulted from discretionary decisions involving numerous policy considerations. 346 U. S. at 39-42. It is quite another matter where, as here, the directives embodied in the policy-making decisions were themselves violated. Even if such directives embodied no specific instructions with respect to the exercise of care, the Government is liable for the failure to exercise reasonable care in their effectuation. *Dahlstrom v. United States, supra,* 228 F. 2d 819.

This Court, in *United States v. Hunsucker, supra,* 314 F. 2d 98-105, announced and followed this legal

principle. In that case property was damaged because of the negligent construction of drainage and sewage systems by a military command which without any specific instructions as to drainage or sewage disposal, had been directed to reactivate an air base. It was held that the Government was not immune from liability "for its failure to take reasonable precautions to prevent damage to appellee's land." Nor should the Government be immunized from liability for operating its airplane without taking "reasonable precautions to prevent damage" to other airplanes.

However, in the instant case, it is not necessary to rely on such negligence based only on general legal principles. Government employees violated safety regulations which constituted the declared policy of the Air Force. No discretion was vested in any Air Force officers or government employees to either ignore these safety policies or to effectuate them in a careless manner.

A.F.R. 55-19 (which was shown to have been violated in a number of respects) promulgated by the Department of the Air Force in 1956 on the subject of "Control of Local Air Force VFR Air Traffic" stated:

> "Safe and efficient local Air Force flight operations today depend, in part, upon the manner in which local aircraft is supervised and controlled. This regulation provides guidance for commanders, pilots and air traffic control personnel for insuring maximum safety and efficiency in their local flying operations." (G. Br. App. C, p. 1.)

This regulation was designed to carry out the Government's policy and obligation to exercise reasonable care in the maintenance and operation of potentially dangerous instrumentalities. *Somerset Seafood Co. v. United States* (C.A. 4, 1951), 193 F. 2d 631; *United States v. Gray* (C.A. 10, 1952), 199 F. 2d 239; *Fair v. United States, supra* (C.A. 5, 1956), 234 F. 2d 288. We direct our attention now to the specific findings involved.

C. The Finding of Negligence Relating to the Establishment and Operation of the KRAM Procedure All Fall Outside of the Discretionary Function Exemption.

1. Findings 26, 27, 29, 30, 55, 66, 67 and 69 (G. Br. App. A, 11, 12, 18, 22) state that the Nellis Command or the pilots should have secured either I.F.R. clearances or traffic information before starting the KRAM procedure but that they did neither and that this failure constituted negligence. The Air Force regulations in effect at the time provided for the furnishing of I.F.R. control by Air Force traffic personnel authorized to provide such control or as an alternative where the personnel were not so authorized to "furnish traffic information to those pilots practicing instrument approaches . . ." Responsibility for compliance with these regulations is placed upon the commander of the base, the pilot and the air traffic control personnel. (AFR 55-19 §§5(c) and (d); G. Br. App. E, 4-5.)

It is argued by the Government, first, that because the control personnel were not authorized to furnish I.F.R. service, only §5(d) relating to the furnishing of traffic information applies. It is then argued that the command of §5(d) is limited to traffic information concerning other military planes and does not cov-

er the traffic information which could be obtained by the military personnel from the C.A.A. This limitation is arbitrarily read into §5(d) by the Government for the section itself simply refers to traffic information without any limitation whatsoever.

In this connection it should be noted that §5(d) is an alternative to §5(c). The first of these alternatives requiring I.F.R. control concededly provides for controlled separation between Air Force jets and commercial planes flying I.F.R. It is completely illogical to read into the alternative §5(d) the elimination of any protection with respect to commercial traffic. If the Government's position on this point were accepted, the ridiculous result would be that the military safety program would either secure controlled separation from commercial aircraft or ignore them altogether. Section 5(d) requires the furnishing of traffic information; commercial planes make up part of the traffic; accordingly, traffic information necessarily includes advice concerning commercial flights. This construction is borne out by §7(c) of the same regulation (G. Br. App. C, 6), which indicates a concern not only with collisions between military airplanes but with collisions generally, necessarily embracing all aircraft; it requires air traffic control personnel to "furnish pilots with traffic advisories and other information on local conditions which will assist them in avoiding collisions during VFR weather conditions." [10 Rep. Tr. 1256-1262.]

It was conceded that §5(d) was totally disregarded in that no arrangements of any kind were made at Nellis to furnish traffic information, either as to military or commercial traffic, to persons practicing

instrument approaches. The Government now seeks to partially explain away this admitted violation by placing upon §5(d) a strained construction which would render it inapplicable to commercial traffic. [12 Rep. Tr. 1582.]

In addition §5(c) of the regulation providing for I.F.R. control is applicable wherever there is personnel authorized "to provide IFR control service," and there is evidence from an Air Force general that the personnel in the control tower at Nellis were authorized to furnish such service. [10 Rep. Tr. 1256-1262.] The fact that the failure to give I.F.R. clearance "service" was not due to lack of qualified personnel is also evidenced by what happened after the accident. Within ten days the rule was established that there would be no practice penetrations over the airway without prior clearance. [12 Rep. Tr. 1626-1628; 20 Rep. Tr. 2611-2613; 45 Rep. Tr. 6008.]

The record thus adequately establishes a negligent failure to comply with safety policies established by Air Force regulations, designed to either achieve controlled separation or to require the furnishing of traffic information to enable separation between planes flying over the airway. Such negligence is covered by the Tort Claims Act. *Eastern Air Lines v. Union Trust Co.* (C.A. D.C., 1955), 221 F. 2d 62, 78, aff'd 350 U. S. 907.

Thus far we have been concerned with in-flight procedures to secure separation between aircraft.

2. Findings 28 and 52 (G. Br. App. A, 12, 18) relate to the total failure of the Nellis command to secure pre-flight information concerning commercial air traffic, including particularly times of flights, altitudes

and volume of traffic, and the consequent negligent failure to adequately brief pilots regarding traffic conditions and, based upon such briefing, to instruct them to exercise extreme caution while flying within the confines of Victor 8. General McGehee, the commander at Nellis, testified that military aircraft were exposed to the same hazards as commercial planes when they are flying in a common area in which there is a high degree of congestion and flying at high speeds. The necessity for obtaining the facts relating to the hazards in order to devise a safety program is no different for the military than it is for the commercial organization. [20 Rep. Tr. 2666-2667.]

It was admitted by the Government that so far as avoiding collisions was concerned the pilot of the military aircraft had the duty of conforming to C.A.R. and Air Force regulations concerning the flights of aircraft. [5 Rep. Tr. 560-561.] This, of course, included the duty to fly the jet in such a way as to avoid colliding with any other plane. Knowledge concerning anticipated commercial traffic obviously would have helped jet pilots in meeting this responsibility. Yet the briefing given the Air Force pilots consisted solely of a rundown of the mission of the jet and the description of jet reactions to the planned maneuvers. [11 Rep. Tr. 1477-1478.] The failure to obtain information concerning commercial traffic and to brief pilots with respect thereto was not the consequence of adherence to any policy decision. This failure was a negligent omission in the realm of ordinary precautions against collisions in flight; such briefings began immediately after the accident here involved occurred. [13 Rep. Tr. 1675-1679; 18 Rep. Tr. 2334-2335.]

3. Findings 47, 48, 49, 50, 61 and 71 (G. Br. App. A, 15-17, 20-24) conclude that the KRAM procedure is a dangerous one and that this fact was known to the Nellis command; that the Nellis command was required by regulations to schedule local VFR flight operations including the KRAM procedure in such a manner as to minimize congestion and potential air collision hazards; that the Nellis command negligently failed to make a study of commercial air traffic in connection with the designing of KRAM and accordingly failed to design KRAM in the light of facts obtainable from such a study; and that the Nellis command could and should have established the KRAM procedure so as to avoid Victor 8 at altitudes regularly used by enroute commercial traffic.

A.F.R. 55-19, §2(b) required the base commander to "schedule local V.F.R. flight operations in a manner which will minimize congestion and potential air collison hazards," and §5(a) directed the "maximum use of outlying facilities in order to relieve air traffic congestion near local navigational facilities." (G. Br. App. C, 2, 4.) In establishing KRAM, the Nellis command apparently gave no consideration to the fact that Victor 8 was a most heavily congested airway. [12 Rep. Tr. 1579-1580.] Anyone who had made a study of the problem could have discovered that the KRAM procedure could have been flown in such a manner that the jet would never be on the airway at the altitudes being utilized by commercial enroute traffic, thereby eliminating the hazard of collision on the airway between high-speed commercial flights and high-speed jets. One of the proximate causes of the accident was the failure to carefully design the KRAM procedure in accordance with the requirements laid down in the regulations re-

quiring the minimization of congestion and of potential air collision hazards. [9 Rep. Tr. 1205-1207; 10 Rep. Tr. 1239-1242; 18 Rep. Tr. 2393; 19 Rep. Tr. 2561-2566.]

At Salina, Kansas, where there had been a problem similar to the one created by KRAM at Nellis, a study was made prior to any collision and as a result the Air Force made a change in the procedure in order to keep the jets off the airway at enroute commercial altitudes [9 Rep. Tr. 1175-1176; 10 Rep. Tr. 1277-1279]; in the Las Vegas-Nellis area, a collision involving the deaths of more than 50 persons was the first thing that stirred the Air Force into taking similar precautions required to reduce the hazard of mid-air collisions over Victor 8.

4. Findings 51, 56, 57 and 68 (G. Br. App. A, 17-19, 22) cover the failure of the Nellis command to coordinate the KRAM procedure with United and the failure to give United any notice concerning the KRAM procedure. A.F.R. 55-19 and 55-19(a) required the Nellis commander to develop directives with respect to its practice penetrations "in coordination with the local air traffic control agency . . ., adjacent military installation commanders, air port operators, and other interested agencies," and to furnish copies of all directives or agreements with respect to such procedure to such agencies. (§§3(a), 6(a) and 7(a); G. Br. App. C, 5, 9.)

Prior to the collision there was no coordination of the KRAM procedure with United. Such coordination took place for the first time after the accident when, as noted above, the commanding general at Nellis called a meeting of representatives of the commercial air lines and gave them the information concerning these prac-

tice flights which he had simply assumed the air lines had prior thereto. [45 Rep. Tr. 6009.]

In addition, A.F.R. 55-19 required commanders when necessary to "issue appropriate NOTAMS announcing that extensive training is being conducted within given vertical limits and that pilots entering the area must use extreme caution." (§1(c); G. Br. App. E, 1.) It was the duty of the commander of each base to issue such NOTAMS where hazards in flight exist. Such NOTAMS had been issued by the Air Force in other areas where there were hazards similar to those existing in the Nellis vicinity. [10 Rep. Tr. 1237-1239; 13 Rep. Tr. 1657-1659; Ex. G-14.] After the accident, a special notice of extensive jet traffic in the Las Vegas-Nellis area was published in the *Airman's Guide* as one of the measures calculated to reduce the risk of collision in the future. [45 Rep. Tr. 6006-6007.]

5. Findings 56-A and 57 relate to the negligent failure of the Civil Aeronautics Authority to notify United of the existence and utilization of the KRAM procedure. The principal argument of the Government with respect to these findings is that these omissions constitute the exercise of functions *by a regulatory agency* and that such functions fall outside of the scope of the Tort Claims Act by virtue of the discretionary function exemption. Reliance is placed upon *Weinstein v. United States* (C.A. 3, 1957), 244 F. 2d 68, which case merely holds that the *performance of regulatory functions* are within the exemption.

If one were to exclude all activities of a regulatory agency, then the negligent operation of an airplane, or any other negligence, by a regulatory agency like the C.A.A. would be exempt; that, of course, is not the

law. Thus the Government has been held liable for the negligent acts of a C.A.A. tower operator, *Eastern Air Lines v. Union Trust Co., supra,* 221 F. 2d 62, 75, 77, the court saying:

> "We hold that the tower operators merely handle operational details which are outside the area of the discretionary functions and duties referred to in §2680(a). . . .
>
> ". . . discretion was exercised when it was decided to operate the tower, but the tower personnel had no discretion to operate it negligently."

Here, the C.A.A. undertook to issue I.F.R. clearances to commercial planes. Whether or not the C.A.A. was required by law to do this is immaterial; once it undertook to issue clearances it was required to exercise reasonable care in so doing. *Cf., Gavagan v. United States* (C.A. 5, 1960), 280 F. 2d 319, *cert. den.* 364 U. S. 933. Having undertaken to grant the clearance, the finding that reasonable care required the C.A.A. to notify those relying upon the clearance of known dangers is certainly not erroneous. This Court, in *United States v. White* (C.A. 9, 1954), 211 F. 2d 79, held that where a business invitee was working on government property there was an obligation to use reasonable care to provide a reasonably safe place for the invitee to work; this included the duty to warn invitee of any known dangers as an incident of the prime duty of furnishing a safe place to work. *Cf., Jennings v. United States* (C.A. 4, 1961), 291 F. 2d 880, 893; *Brown v. United States* (D.C. Fla., 1961), 193 F. Supp. 692.

The Government's reliance upon 28 U. S. C. 2680(h) relating to exemption from the Tort Claims Act of

causes of action predicated upon misrepresentation is misplaced. This section applies to situations in which misrepresentation is the basis of the cause of action. Where the theory of the complaint is that there was a breach of a legal duty to investigate, ascertain and furnish facts, *i.e.,* the tort of "negligent misrepresentation" this section applies. *United States v. Neustadt,* 366 U. S. 696, 706-707. However, where the cause of action arises out of the negligent operation of a vehicle or, as here, of an airplane or out of the negligent performance of a task undertaken by a Government agency, the section does not apply even though the negligence consists of a failure to warn. *Indian Towing Co. v. United States,* 350 U. S. 61, 69; *United States v. Gavagan, supra* (C. A. 5, 1960), 280 F. 2d 319, 325; *Fair v. United States, supra,* 234 F. 2d 288, 294.

These authorities are to be distinguished from the flood damage cases like *Clark v. United States* (C. A. 9, 1954), 218 F. 2d 446, relied on by the Government in which there was no duty owing from the Government to the injured party *other than* the making of the representation which constituted the basis of the cause of action. The correct rule is laid down in another case relied upon by the Government, *National Mfg. Co. v. United States* (C. A. 8, 1954), 210 F. 2d 263, *cert. den.* 347 U. S. 967:

> "The intent of the section [28 USC 2680(h)] is to except from the Act cases where mere 'talk' or failure to 'talk' on the part of a government employee is asserted as the proximate cause of damage sought to be recovered from the United States." 210 F. 2d at 276.

In this case the proximate cause of the damage was the collision of the two planes caused in part by the negligent operation of the jet. The failure to give warnings was merely one of the incidents of that negligence and was not exempted from coverage by §2680-(h).

D. The Contention of the Government That the Findings of Negligence Are Without Evidentiary Support Is Without Merit.

The individual findings of negligence were not specifically challenged by the Government as being unsupported by the evidence. However, there is a general argument made that none of the findings of government negligence are supported by the evidence. This contention is predicated upon testimony from various government witnesses that in their opinion the KRAM practice penetration was a safe procedure.[20] At the most, this created a conflict in the record. Elsewhere the Government (G. Br. 51), in arguing that the pilots were not negligent, points to some of the hazards of the procedure and in effect seems to be saying that the procedure was so unsafe that even though the pilots exercised reasonable care they could not avoid a collision.

The fact is that there is a great deal of evidence that, even though sufficiently alert pilots could have avoided the accident, the operation was nevertheless an exceedingly dangerous one. The findings regarding the nature of the procedure, the speeds involved,

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[20]This argument serves to underscore the evidentiary support for the court's findings of pilot negligence in failing to avoid a collision while following a procedure which the Government itself has asserted and now asserts is safe.

the volume of traffic, and the degree of preoccupation of the observer pilot because of the various tasks assigned to him all indicate the hazardous nature of the procedure. [FF. 16, 17, 47, 63 and 71; G. Br. App. A, 7-9, 15-16, 21-24.][21]

The mere fact that it would have been possible for the pilot to see and avoid other planes does not lead to the conclusion that there were no hazards or that other precautions were not required in the exercise of reasonable care. The exercise of ordinary care in a situation where collision almost inevitably meant the deaths of many persons demands caution commensurate with the risks. Here the establishment and maintenance in violation of Air Force safety policies of a procedure involving serious risks of mid-air collisions constituted negligence, even though pilot vigilance commensurate with the risk could have avoided the accident.

VII.

The Granting of Motions for Summary Judgment on the Issue of Liability in the Seven Nevada Cases Was Not Error.

United incorrectly assumes that the summary judgment on liability in the seven Nevada cases was predicated exclusively on the judgments in favor of the plaintiffs-appellees in the consolidated *Wiener* cases; it argues that both the said *Wiener* judgments and the Nevada case judgments are "California" judgments;

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[21]In connection with pilot preoccupation the court's attention is directed to C.A.R. Part 60, Ex. G-5 §60.12, Note c, which prohibits special flight activities interfering with scanning without compensating therefor. Here there was no such compensation for the onerous tasks imposed upon the observer in addition to scanning. [F. 16; G. Br. App. A, 7-8.]

and that California law, which requires finality on appeal for the utilization of a judgment as *res judicata,* is applicable and renders the summary judgments erroneous. An examination of the record and the law will reveal the several fallacies involved in these contentions.

The summary judgment was based upon all of the cases consolidated with *Wiener* including the counterclaims as between United and the Government. Finding of Fact No. 2 in the "Findings of Fact, Conclusions of Law, and Order Granting Plaintiffs' Motion for Summary Judgment on the Issue of Liability Against Defendant United Air Lines, Inc." specifically states that the said cross-claims were tried by the Court which "made its findings of fact and conclusions of law and judgment on the cross-claims, finding that negligent conduct on the part of each of said defendants was a proximate cause of the aforesaid mid-air collision". Finding No. 11 states, "In the Wiener litigation, defendant United Air Lines, Inc. voluntarily filed and litigated cross-claims against the United States of America on the issue of liability." Conclusion of Law No. 5 refers to the judgments in Wiener as being *res judicata.* [Nollenberger R. 304, *et seq.*]

The findings on the cross-claims set forth in considerable detail United's acts and omissions found to constitute negligence on its part, including specifically the findings numbered 65, *et seq.* (G. Br. App. A, 21 *et seq.*) In those findings the court was concerned with whether or not United exercised ordinary care, rather than the highest degree of care. Certainly, the findings that United failed to exercise ordinary care

embrace the failure to exercise the much higher degree of care imposed upon United with respect to its passengers.

The cross-claim of United was denied on the ground, among others, that United was in *pari delicto* with the Government. (See Conclusion of Law XI, G. Br. App. A, 28.) This finding of United's negligence was material to United's cross-claim adjudicated under the provisions of the Federal Tort Claims Act. In disposing of this counter-claim, the trial court sat as a Federal Court applying federal law and procedure. It is clearly established that under federal law, a judgment is final for purposes of *res judicata* and collateral estoppel upon completion of the trial court proceedings. This subject is covered in a most through manner in the opinion below of Judge Peirson M. Hall, *United States v. United Air Lines, Inc.*, 216 F. Supp. 709, 720-724. [Nollenberger R. 314, *et seq.*] If, as United contends, one must look to the law of the forum of the judgment set up as *res judicata,* then the judgment of the Federal Court on the tort claim cross-claim may be used in a state or federal court proceeding to establish the negligence of United through *res judicata* by way of collateral estoppel; under federal law the completion of trial court proceedings created sufficient finality for the use of that judgment for that purpose in any court. (*Stoll v. Gottlieb,* 305 U. S. 165, 170, relied on by United, U. Br. 82.)

If as the trial court held, we believe correctly, that federal law determines the finality of the judgments appealed to this Appellate Court for *res judicata* purposes, the pending appeal to this Court did not render either the judgments in favor of the appellees in *Wiener*

against United or the judgments on United's cross-claim lacking in the requisite finality. This subject, too, is completely and excellently covered in the opinion of the trial judge, *United States v. United Air Lines Inc.,* 216 F. Supp. 709, 718-725. [Nollenberger R. 314, *et seq.*]

If it is necessary to look to the law of the forum granting the summary judgment, the result is no different. As has been noted, and there is no dispute with respect to this, the court below was sitting as a Nevada court when it granted summary judgment, although the entry of that judgment was made by the court sitting as a California court. When the court ordered summary judgment it was bound to apply the law of Nevada. Moreover, even if the summary judgment had been granted by the court sitting as a California court after the change of venue based upon *forum non conveniens,* Nevada law would still be applicable. For such a transfer has the effect of transferring to the second forum the law of the place where the action was originally filed. *Headrick v. Atchison T. & S.F. Ry. Co.* (C.A. 10 1950), 182 F. 2d 305; *King Bros. Productions, Inc. v. R.K.O. Tele-Radio Pictures, Inc.* (D.C. S.D.N.Y. 1962), 208 F. Supp. 271. Concededly, under the law of Nevada the judgments in favor of the individual plaintiffs are final for purposes of *res judicata.*

It is not necessary for this Court to resolve the question as to whether the applicable law is (1) the law of the forum rendering the judgment relied upon to establish *res judicata,* or (2) the law of the forum of the case in which judgment predicated upon the doctrine of *res judicata* is rendered, or (3) the law of the Appellate Court reviewing the judgment relied on as

res judicata. In instance (1), the judgment on the cross-claims under the Tort Claims Act is final for purpose of *res judicata;* in (2) and (3), both the cross-claim judgment and the judgments in favor of the individual appellees are final for *res judicata* purposes.

Finally, assuming *arguendo* that California law applies in determining the finality of the judgment constituting the basis of *res judicata,* the fact that the *Wiener* appeal has been consolidated with the appeals in the Nevada cases is determinative of the issue. If the *Wiener* judgement against United were to be reversed, obviously the Nevada judgments would be also. If the *Wiener* judgments are affirmed, they will become final; in that event were the Nevada judgments to be reversed on the ground that the *Wiener* judgments were not final at the time that the Motion for Summary Judgment was granted, that situation would no longer be true at the time of the hearing following the remand and the result would be that the summary judgment would again be granted.

It is well established that such useless and time-consuming procedures will not be followed either by the federal or the state courts. The federal statutes and rules give to this court broad powers to take such action with respect to the judgments of the trial court ". . . as may be just under the circumstances" (28 U. S. C. 2106) and establish the principle: "The Court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial right of the parties." (Rule 61, Federal Rules of Civil Procedure.) The authorities construing these principles indicate that they have direct relevance to the facts of this case.

In an appeal from a judgment based on *res judicata,* the Appellate Court where possible will consider the correctness of the judgment set up by way of *res judicata* and if the Court finds it correct will affirm the judgment based on *res judicata. A. F. Pylant, Inc. v. Republic Creosoting Co.* (C.A. 5, 1961), 285 F. 2d 840. Here, the consolidation of the *Wiener* and Nevada cases on appeal permits this court to follow that procedure. In *Hahn v. Padre* (C.A. 9, 1956), 235 F. 2d 356, 359, this court held that it would not reverse a case where the result of the reversal ". . . would carry us on around again to the same final legal destination. We are not constituted to order the performance of utterly useless acts." See also *Golden North Airways, Inc. v. Tanana Publishing Company* (C.A. 9, 1955), 218 F. 2d 612, 621; *Egan v. Teets* (C.A. 9, 1957), 251 F. 2d 571. "Courts of review have a higher function than to be 'impregnable citadels of technicality.'" *Duff v. Page* (C.A. 9, 1957), 249 F. 2d 137, 139-140.

In *Brady v. Beams* (C.A. 10, 1942), 132 F. 2d 985, 988, a motion to dismiss had been granted by the trial court relying upon judicial notice of prior proceedings in which the matters presented in the complaint had been adjudicated. On appeal, it was urged that the trial court could not properly take judicial notice of the prior proceeding. The Appellate Court held that this argument was irrelevant because the prior proceedings were pending before it on appeal and it could take judicial notice of such prior proceedings and such judi-

cial notice did support the dismissal. Accordingly, the judgment of the trial court was sustained, the Appellate Court saying,

> ". . . No useful purpose would be served by remanding the cause to the trial court for the purpose of enabling the appellees to plead such facts in some appropriate manner and then draw on the record in the other case for the proof. The remanding of the cause for that procedure would be nothing short of subordinating substance to shadow, and the circumstances do not call for that."

In this case, too, both records are before this court. If the *Wiener* judgments are affmired, it would subordinate "substance to shadow" to direct a reversal of the Nevada cases. In the case in which both judgments, *i.e.,* the one set up as *res judicata* and the one in which this plea was accepted went up on appeal similtaneously, the court said: "This plea [res judicata] was technically invalidated when appeal was taken from the former judgment. We have now affirmed the former judgment, and it again stands as a bar to further substantially identical litigation between the same parties." *Guaranty Underwriters v. Johnson* (5 Cir. 1943), 133 F. 2d 54, 56. If and when the appeals in the *Wiener* cases are affirmed, the situation here will be exactly the same as it was in the cited case.

California law is the same as federal law in this regard. In *Charles H. Duell, Inc. v. Metro-Goldwyn-Mayer Corp.,* 128 Cal. App. 376, 385, 17 P. 2d 781 (1932), the issue was whether a judgment in favor of

a defendant who is a principal to a contract could be set up as *res judicata* in an action against the agent of that principal based on the same contract. The trial court had ruled that the complaint did not state a cause of action but the Appellate Court did not reach that question because it affirmed on the basis of *res judicata* saying:

> ". . . Plaintiff has had its day in court, and has been accorded a full and complete hearing on every issue presented. It can ask no more.
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> "Aside from a consideration of the parties to a controversy, the courts have a direct interest in determination of litigation. The maxim of the laws run that it is to the interest of the republic that there be an end to the case. Under our conclusion here, if we should remand the case to the court below for further proceedings, the course to be there followed, under the law of the case rule, would be simply for the defendants to introduce the record of the former case, now unquestioned, and judgment would follow. With the entire record before us, at least sufficient thereof for the present consideration, it would seem an idle act to thus again set in motion the machinery of the courts to bring about a result already predetermined." To the same effect, see *Carroll v. Carroll,* 16 Cal. 2d 761, 771, 108 P. 2d 420 (1940); *Hull v. Ray,* 211 Cal. 164, 168-169, 294 Pac. 700 (1930); *Van Wyke v. Burrows,* 98 Cal. App. 415, 423, 277 Pac. 190 (1929).

Other states also follow the same principle. Even if in the trial court there was correctly urged a de-

fense that judgment should not be rendered because it depends upon the finality of a judgment in another case, the appellate court will disregard the alleged error if in the interim the other judgment has been affirmed. *Standard Insurance Co. v. Hodge,* 294 P. 2d 567 (1956); see also *Reyes v. Smith,* 288 S. W. 2d 822 (1956); *Malone v. Carter,* 132 Fla. 818, 182 So. 214 (1938); *Scheuer v. Scheuer,* 308 N. Y. 447, 126 N. E. 2d 555 (1955); *Ransier v. Michigan,* 149 Mich. 487, 112 N. W. 1120 (1907); *John v. Northern Pacific Ry. Co.,* 42 Mont. 18, 111 Pac. 632 (1910); *Felker v. Roth,* 346 Ill. 40, 178 N. E. 381 (1931); *Moose v. Vesey,* 255 Minn. 64, 29 N. W. 2d 649 (1947); *Savage v. McCauley* 302 Mass. 457, 19 N.E. 2d 695 (1939); *Bohmont v. Moore,* 141 Neb. 91, 2 N. W. 2d 599 (1942); *Renshaw v. Reynolds,* 317 Mo. 484, 297 S. W. 374 (1927); *Lowder v. Smith,* 201 N. C. 642, 161 S.E. 223 (1931); *Follett v. Sheldon,* 195 Ind. 510, 144 N. E. 867 (1924); *Cathcart v. Hopkins,* 119 S. C. 190, 112 S. E. 64 (1922); *Ensminger v. Campbell,* 242 Miss. 519, 134 So. 2d 728 (1961); *In re Bagnola,* 178 Iowa 757, 160 N. W. 228 (1916).

Finally, California law does not contemplate that the doctrine of *res judicata* may not be utilized at all to prevent unnecessary relitigation while a case is pending on appeal. To the contrary, the rule is that a case pending on appeal may constitute the basis for a plea in abatement by which the party relying thereon may ". . . lay the foundation for securing a continu-

ance of the trial of the second action until the final determination of the first." *Pellissier v. Title Guarantee & Trust Co.,* 208 Cal. 172, 184, 280 Pac. 947 (1929). And if a stay is not granted, mandamus will issue. *Thriftimart, Inc. v. Superior Court,* 202 Cal. App. 2d 421, 21 Cal. Rep. 19 (1962). Here, if the *Wiener* judgments are finally affirmed, they may be utilized in any event as a basis for *res judicata* in the Nevada cases. In such event the only possible effect of a reversal in the Nevada cases would be to require unnecessary re-trial of the damage aspect of those cases. As a matter of law, of judicial policy and of common sense the Nevada cases should be disposed of in such a way that the affirmance of the *Wiener* judgments will result in the affirmance of and the avoidance of new trials in the Nevada cases.

As has been noted above, the trial court correctly held that the various judgments in the *Wiener* cases including the judgments on the counter-claim were final so far as the trial court was concerned and, under the applicable law, could be set up as a bar by *res judicata* through collateral estoppel. However, if it is assumed that the District Court erred in holding that the *Wiener* judgments were final for purposes of *res judicata,* it would be idle to reverse the judgments in the Nevada cases on the summary judgment aspect because the District Court would be bound eventually to grant the same summary judgments in the event of an affirmance of the *Wiener* cases.

VIII.

Without Regard to the Doctrine of Res Judicata, the Uncontradicted Facts Before the Trial Court on the Summary Judgment Motion in the Nevada Cases Established Appellees Right to Judgment on the Issue of Liability as a Matter of Law.

The entire record in the *Wiener* cases including the record on the counter-claims between United and the Government was before the Court on the Motion for Summary Judgment. [Nollenberger R. 304.] The Court also had before it the uncontroverted affidavit of Ben Margolis, stating that in *Wiener* and the consolidated cases "there was complete pre-trial discovery prior to the trial therein" and that "on the trial each of the parties had every opportunity to present and *did present their complete cases* on the said issue of liability." [Emphasis added—Matlock R. 317, 321.]

The admissions of United in the *Wiener* record established (1) its knowledge of the dangerous conditions, including high speed and irresponsible flying, existing in the Las Vegas-Nellis area, (2) the need for any common carrier to obtain the specific facts relating to the possible hazards of collision in flight in such a dangerous area, (3) the failure of United to take any steps whatsoever to obtain such facts and (4) the failure of United to take any precautions whatsoever calculated to deal with the hazards of collision in flying through this known dangerous area.[22] The

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[22]These matters are covered in detail *supra* under the heading "III. The Jury Verdict Is Supported by Substantial Evidence of United's Negligence With Respect to Its Failure to Take Reasonable Precautions Prior to the Fatal Flight."

trial court had before it these uncontradicted admissions of United of the failure to exercise ordinary care —let alone the highest degree of care imposed upon it by law—in order to avoid the collision which resulted in the death of all of the passengers for whom it was responsible.

The trial court granted the Motion for Summary Judgment on the basis of *res judicata* and did not deem it necessary to reach the question as to whether or not the admitted fact also required the granting of the Motion for Summary Judgment. [Nollenberger R. 314, *et. seq.*] It is submitted that these facts afford an additional ground for sustaining of the trial court's order granting the summary judgment.

As a common carrier of passengers for hire, United was required to exercise the highest practicable degree of care of which human judgment and foresight were capable to make the passengers flight safe, *Forrester v. Southern Pacific Co.,* 36 Nev. 247, 134 Pac. 753 (1913). As has been shown above, the principles of *res ipsa loquitur* covered the passengers for hire killed as a result of the mid-air collision. The application of the principle of *res ipsa loquitur* in and of itself creates a *prima facie* case of liability, including proximate cause,[23] and it is encumbent upon United to offset this *prima facie* case by showing that it used the care required of it under the circumstances—in this case the highest degree of care. Where the common carrier fails to meet the burden imposed upon it by law, plaintiff is entitled to judgment as a matter of law. *(Nyberg v. Kirby,* 65 Nev. 42, 188 P. 2d 1006,

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[23]*Vandermal v. Ford Moter Co.,* 219 A.C.A. 263, 271.

rehearing denied; 65 Nev. 42, 188 P. 2d 1006, rehearing denied; 65 Nev. 42, 193 P. 2d 850 (1948).)

The burden thus placed upon the carrier to rebutt the inference of negligence required a ". . . showing that it exercised the utmost care and diligence." *Hardin v. San Jose City Lines, Inc.,* 41 Cal. 2d 432, 437; *Mudrick v. Market Street Ry. Co.,* 11 Cal. 2d 724, 730-731; *Ales v. Ryan,* 8 Cal. 2d 82, 106 (cited with approval in *Nyberg v. Kirby, supra,* 65 Nev. 42, 188 P. 2d 1006.) Where the evidence establishes *possible* causes of the accident, which possible causes could have been eliminated by the exercise of the degree of care required by law, and there is a failure to show either that the possible causes were not the responsibility of the common carrier or that they did not contribute to the accident, then the doctrine of *res ipsa loquitur* requires judgment for the plaintiff. In such a case:

> " '. . . the defendant will not be held blameless except upon a showing either (1) of a satisfactory explanation of the accident, that is, an affirmative showing of a definite cause for the accident, in which case no element of negligence on the part of the defendant inheres, or (2) of such care in all possible respects as necessarily to lead to the conclusion that the accident could not have happened from want of care, but must have been due to some unpreventable cause, although the exact cause is unknown. In the latter case, inasmuch as the process of reasoning is one of exclusion, the care shown must be satisfactory in the sense that it covers all causes which due care on the part of the defendant might have prevented.' " [*Bour-*

guignon v. Peninsular Ry. Co., 40 Cal. App. 689, 694-695 [181 P. 669], quoted with approval in *Dierman v. Providence Hospital,* 31 Cal. 2d 290, 295.]

In the present case, every person on the two planes involved in the collision was killed. The exact cause of the accident has not been and cannot be ascertained. There are numerous possible causes of the collision, including the conceded failure on the part of United to investigate the facts with respect to irresponsible flying and to then adopt a safety program based upon the facts so ascertained, and the failure to take precautions necessary to deal with the hazards which were known to United as well as those which, in the exercise of the responsibility imposed upon United, should have been known by it. United would be unable to show in a new trial either that these omissions did not cause the accident or that it is not responsible for them.

Accordingly, it has been conclusively established that United cannot meeet the burden imposed upon it by the *res ipsa* doctrine; the inference of negligence arising out of said principle establishes the liability of United for the deaths of the passengers on its plane. Thus, even were the *Wiener* judgments not *res judicata* the Motion for Summary Judgment was properly granted. There should be no reversal where as here the resubmission of the issue on a new trial could not change the result. *Hull v. Ray,* 211 Cal. 164, 168-169, 294 Pac. 700 (1930); *Renshaw v. Reynolds,* 317 Mo. 484, 297 S. W. 374, 378 (1927).

IX.

The District Court Did Not Err When in Two of the Nevada Cases, in Order to Conform the General Verdicts to the Answers to the Special Interrogatories, It Changed the Amounts of the General Verdicts.

United concedes that the jury in the Nevada cases was properly instructed as to the various elements of damages which it was permitted to consider. However, United seeks a retrial of the issue of damages in two of the Nevada cases in which the trial judge increased the amount of the general verdicts in order to correct errors in computation[24] and to conform the total award to the special interrogatories, on the ground that the trial court erred in the exercise of the power conferred on it by Rule 49(b) of the Federal Rules of Civil Procedure. (U. Br. 85-86.) It is argued that the submission of written interrogatories calling for findings on the specific elements of damages, which the jury was instructed it might consider, had the effect of informing the jurors that they *"must"* take into consideration those elements or factors of damages which the jury *might* properly, but was not required to, consider.

In the first place, the jury was not compelled by the Court below to do anything. If the jury had disagreed among themselves with respect to the issue involved in any interrogatory, they could have declined to give any answer. *Gulf Refining Co. v. Fetschan* (6 Cir. 1942), 130 F. 2d 129. If the jury reasonably felt that

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[24]As we show hereafter, this is the usual situation where courts will follow the jury's specific answers rather than its erroneous calculations in the general verdict.

there was no evidence in the record upon which they could base an answer, a particular interrogatory calling for an amount could have received the reply of none. The mere submission of interrogatories to the jury did not compel them to find affirmatively on every factor or element of damages.

More important, however, United's basic argument is incorrect. It is not the law of Nevada that a jury is free to disregard the evidence and consider only such elements of damages as it may believe the law should establish. To so hold would be to make the jury the triers of the law as well as of the facts. The elements of damages are a matter of law to be delineated by the trial court. The application of the evidence to these elements presents questions of fact for the jury. It was the Court's function to instruct the jury, among other things, concerning the law relating to life expectancy and work and earning expectancy. It was the duty of the jury to determine the life expectancy of the decedents and their work and earning expectancy in the light of the evidence presented. The jury would not have had the right to then disrgeard these findings and thus, in effect, establish as a matter of law that life expectancy and work and earning expectancy were not elements to be considered in determining the amount of damages to be awarded.

In *Porter v. Funkhouser,* .... Nev. ....., 382 P. 2d 216 (1963), an instruction was approved which said to the jury, "you *shall* [not, you may] award plaintiff such damages as in your judgment will compensate them for the pecuniary loss proved to have been sustained by them. The measure of such compensatory

damages is *such sum as will equal* the pecuniary or monetary loss that the plaintiffs will have actually suffered by being deprived of the support, financial aid, services, earnings and probable future companionship, society and comfort by the death of the deceased." (Emphasis added, 382 P. 2d at 217-218.)[25] Except for the provision for damages, for loss of companionship, society and comfort, the law was the same at the time of the death of appellees' decedents, and the *direction* to the jury to consider these elements of damages applies with equal force to the wrongful death statute of Nevada prior to its amendment.

In *Estate of Riccomi,* 185 Cal. 458, 461, 197 Pac. 97, 98 (1921),[26] it was noted that the recovery to which plaintiffs were entitled under the wrongful death statute was "the pecuniary loss of each of the heirs who had suffered a pecuniary loss by reason of the death of the deceased." In *Riccomi* the Supreme Court in referring to one of its prior decisions pointed out that it was there held that the trial court properly instructed the jury " 'that the husband *was entitled* to recover the value of the present and future services of the "wife and companion", and the children the value of the mother's "nurture and instruction, moral and physical, and intellectual training"; that they "*must* award such a lump sum for damages *as will*

[25]In 1960, the Nevada statutes were amended to allow recovery for the loss of probable future companionship, society and comfort, which elements of damages were not referred to in the statute existing at the time of the accident here involved. A.B. 230, C, 169, Stats. of Nevada (1960).

[26]Nevada has stated that there is no "material point of difference between the laws" of California and Nevada relating to damages for wrongful death except that Nevada permits the jury to impose exemplary damages. *Christensen v. Floriston Pulp and Paper Co.,* 29 Nev. 552, 92 Pac. 210, 216-17 (1907).

fully compensate the plaintiffs, both the husband and children, *for the pecuniary value* to them of the wife and mother.' "

The reason why the jury *must* consider all proper elements of pecuniary loss is because the wrongful death statute covers pecuniary loss and only pecuniary loss. "Nothing less [than recovery of all pecuniary loss established by the evidence] would be a just compensation for the injury, and anything more, or anything in the realm of improbability, conjecture or mere fancy, would be beyond the purview of the state and unjust to the defendant." *Bond v. United Railroads of San Francisco,* 159 Cal. 270, 277, 113 Pac. 366, 369 (1911) (Emphasis added.) To the same effect, see *Pearson v. Picht,* 184 Wash. 607, 52 P. 2d 314, 316 (1935); *Belford v. Allen,* 183 Okla. 256, 80 P. 2d 671, 674-675 (1938); *McCormick on Damages* (1935), Section 99, page 346.

It thus appears that as a matter of law, the duty of the jury to fix an amount of damages "which is fair and just" could not be performed without compensating for each of the elements of pecuniary loss suffered by the plaintiff. In fact, if the case had been tried by the court sitting without a jury and the findings had revealed that the court in determining the amount of damages had not allowed compensation for certain elements of pecuniary damages, it would have been reversible error. *O'Toole v. United States* (C. A. 3, 1957), 242 F. 2d 308, 311-313; see also *Workman v. Harrison* (C. A. 10, 1960), 282 F. 2d 693, 699-700, remanding the case to the trial court to make specific findings on damages. *Cf. Hatahley v. United States,* 351 U. S. 173.

The common sense as well as the law of the matter is that the jury was not at liberty to disregard the essential elements of damages set forth in the interrogatories, and that if the trial court's instructions implied that they might, United received far more favorable instructions than the law required.[27] However, contrary to United's argument, the trial court did not instruct the jury to award "fair and just" damages in the abstract; the jury was instructed that it "*should* award . . . such sum as, under all of the circumstances may be fair and just compensation for the *pecuniary loss* which the widow and children have suffered." [Nollenberger, 6 Rep. Tr. 665, emphasis added.] The jury was not told that it had the discretion to deny recovery of any item of pecuniary loss. Far too much significance has been placed by United upon the use of the word "may" in connection with some of the instructions referring to the elements of damages to be considered by the jury. Those instructions should be read in the light of the direction that the jury's award "should" cover "pecuniary loss".

The jury was told "you may consider the age of the deceased". [Nollenberger, 6 Rep. Tr. 666.] If United's position is to be sustained, the jury was free to disregard the decedent's age. If it did that it would either determine the case in a vacuum or arbitrarily assume some age other than the evidence established.

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[27]A party will not be heard to complain of an instruction more favorable to him than that to which he is entitled. *St. Joseph & Grand Island Ry. Co. v. Moore*, 243 U. S. 311, 313; *Steger v. Cameron*, 109 F. 2d 347, 348-9 (C.A.D.C. 1939); *Happoldt v. Guardian Life Ins. Co.*, 90 Cal. App. 2d 386, 398-400, 203 Pac. 2d 55 (1949); Christiansen v. Hollings, 44 Cal. App. 2d 332, 344-5 112 P. 2d 723 (1941); *Marton v. Pickrell*, 112 Wash. 117, 191 Pac. 1101, 1102-3 (1920).

That the use of the word "may" was not intended to lead to such an unreasonable conclusion is evidenced by the instructions in their entirety.

Immediately after the jury was told "You may consider certain elements of damages", the Court continued: ". . . you *should* consider all of the services which are susceptible of being furnished by others to the plaintiffs. . . . Plaintiffs are *entitled* to recover the reasonable value of such services. . . ." [Nollenberger, 6 Rep. Tr. 666-671, emphasis added.] There was no objection to this instruction. It would be odd indeed if the jury were permitted to disregard the contributions for support from decedent but were required to consider services which he furnished.

The only sensible resolution of this alleged conflict is to look at the instructions as a whole, in which event the word "may" cannot reasonably be given the purely permissive meaning for which United contends. The court instructed the jury "In computing the amount of damages you should limit yourself to the factors and considerations which are detailed in my instructions". A verdict based upon "surmise or pure speculation" was ruled out. [Nollenberger, 6 Rep. Tr. 671, 675.] If the jury was free to disregard factors and considerations set forth in the instructions, what is left is largely surmise and speculation upon the basis of which the jury in the abstract might decide what is "fair and just". This, the Nevada law did not contemplate. Whether or not error was committed as complained of by United on this aspect of the case depends not upon what was said in the instructions, whether or not they were more favorable than the law requires, but upon the principles of law which are applicable to the interrogatories and the jury verdicts.

In *Chesapeake & O. Ry. Co. v. Hawkins* (4th Cir. 1909), 174 Fed. 597, it was held that the statute there involved left it to the jury to determine generally what award was fair and just. As was pointed out in that case, the West Virginia statute there involved made no reference to "pecuniary damages" and, therefore, the West Virginia statute was different than the English statute and the statutes of other states making the measures of damages "the pecuniary injury resulting from such death". Of course, both the California and the Nevada wrongful death statutes fall precisely within the category distinguished in the *Chesapeake* case. What United is arguing for is a construction of the Nevada statute as though it omitted all reference to pecuniary damages. What is fair and just results from factual findings as to the pecuniary elements of damages established by law; it does not arise out of some mystical concept, the boundaries of which are delineated by the jury. *Bond v. United Railroads of San Francisco,* 159 Cal. 270, 278-279, 113 Pac. 366 (1911).

If United were right with respect to its contentions here, then the jury after answering the special interrogatories would have been free to award $350,000.00 and it would not be possible to argue that the award was inconsistent with the interrogatories. The special interrogatories serve a useful function to both parties. They prevent the jury from awarding non-pecuniary damages simply because the jury might abstractly deem the amount fair and just, and they protect the right of the plaintiffs to the pecuniary damages to which they are entitled.

United complains that there is something mechanical and contrary to law about computing each element of damages separately and then totalling the amount of such elements in order to arrive at the total award. There is nothing mechanical about this, nor is it contrary to law. The jury is left free to determine for itself in accordance with the Court's instructions the fair and just amount of each element of damages. Then as was stated in *Estate of Riccomi,* 185 Cal. 458, 461, 197 Pac. 97 (1921): "The total recovery to be had is the aggregate of the pecuniary loss of each of the heirs who has suffered a pecuniary loss by reason of the death of the deceased." Similarly, Restatement, Torts, Section 925, page 640, sets forth the principle: "The total represents the worth of the decedent's life in a pecuniary way to his family."

United's argument that the substitution of the results of the answers to the special interrogatories for the general verdict of the jury was contrary to law and violated its constitutional right to a jury trial is in accord with neither State nor Federal law. As early as 1885, the general statutes of Nevada (Section 3199) provided for special findings of fact by a jury with the proviso that "where a special finding of fact shall be inconsistent with the general verdict, the former shall control the latter, and the Court shall give judgment accordingly." The Nevada Supreme Court has noted that the use of interrogatories in this manner is a desirable way of avoiding second trials and is an effective way of limiting the jury to findings of fact. *Lambert v. McFarland, 7* Nev. 159. The aforementioned statutory provision continued in effect until the adoption of the Federal Rules of Civil Procedure by

Nevada in 1952, since which time, Nevada has the same Rule 49(b) which governs procedure in the Federal Courts. (NRS, Nevada Rules of Civil Procedure.)

It has been stated that without the use of F. R. C. P. 49, many legal questions would remain "perpetually sealed behind the impenetrable mystery of a general verdict." *Delta Engineering Corp. v. Scott* (C.A. 5 1963), 322 F. 2d 11, 15. See also *Tugwell v. A. F. Klaveness & Co.* (C.A. 5 1963), 320 F. 2d 866, 868, n. 2. In this Circuit, it has been stated:

> "The Federal Rules of Civil Procedure, Rule 49, 28 U.S.C.A. following Section 723c were designed to encourage and facilitate the use of the special verdict, or, in the alternative, the general verdict accompanied by the jury's answer to interrogatories as to issues of fact. As an appellate court we have no power to direct trial judges to call for fact-verdicts, but a general and unexplained lump verdict does not cover up substantial errors at the trial." *Pacific Greyhound Lines v. Zane* (C.A. 9 1947), 160 F. 2d 731, 737, n. 7.

Since Rule 49(b) specifically provides that the Court may submit interrogatories "upon one or more issues of fact the decision of which is necessary to a verdict," there can hardly be any question that the court is authorized to submit in its discretion interrogatories with respect to damages, as the decisions referred to in the opinion of the court below indicate, 216 F. Supp. 734, 740-742.

The constitutional question stated by United has been disposed of by the Supreme Court in *Walker v. New*

Mexico & Southern P. R.R. Co., 165 U. S. 593, 597-598 where the Court said:

> ". . . If the facts, as specially found, compel a judgment in one way, why should not the court be permitted to apply the law to the facts as thus found? * * * Of what avail are special interrogatories and special findings thereon if all that is to result therefrom is a new trial, which the court might grant if it were of opinion that the general verdict contained a wrong interpretation or application of the rules of law? Indeed, the very thought and value of special interrogatories is to avoid the necessity of setting aside a verdict and a new trial—to end the controversy so far as the trial court is concerned upon that single response from the jury."

The Court went on to conclude that there was no violation of the Constitution by a statute which requires that the Court ". . . when a conflict is found between the two [the special interrogatories and the general verdict], render such judgment as the answers to the special questions compel." See also Notes of Advisory Committee on Rules under Rule 49 referring to the *Walker* decision on constitutionality.

Dimick v. Schiedt, 293 U. S. 474, relied upon by United has no application here because there without the submission of special interrogatories, a general verdict was increased by the court. This, of course, deprives the defendant of a jury trial. However, when special interrogatories are answered by the jury, and the results flowing from them are substituted for the general verdicts, it is the true verdict of the jury, free

from errors of law and fact, which is being effectuated. It has always been the general rule of common law and of the statutory provisions dealing with this subjet that where a general verdict is smaller than the amount which is computed from the answers to special questions, the trial court is empowered to increase the verdict. *Clementson, Special Verdicts and Special Findings by Jury* (1905), 153. See also *Froman v. Rous,* 83 Ind. 94, 96 (1882) where the Court said: "Where the facts specially found clearly show that the jury have erred in computing the amount of recovery, there is a conflict between the answers and the general verdict, and the former must control." To the same effect, see *Wood v. Wack,* 31 Ind. App. 252, 257, 67 N. E. 562 (1903). Likewise, in *Kirkpatrick v. McMilan,* 49 N. M. 100, 103, 157 P. 2d 772 (1945), the New Mexico Supreme Court held that where there appeared to be an error in computation resulting in a difference between the general verdict and the answers to the special interrogatories, the conflict must be resolved in favor of the special findings. To the same effect, see *Phelps & Bigelow Windmill Co. v. Buchanan,* 46 Kan. 314, 26 Pac. 708 (1891); *Loewnburg v. Rosenthal,* 18 Ore. 178, 22 Pac. 601 (1889); *Wayne v. New York Life Insurance Co.* (C. A. 8, 1942), 132 F. 2d 28.

It is therefore plain that a jury's error in calculations resulting in a divergence between the general verdict and answers to interrogatories is a classic example of "inconsistency" which Rule 49(b) precisely intended to remedy by empowering the trial court to enter appropriate judgment upon the special findings of the jury. That errors will occur in complex cases involving

damages, such as in wrongful death actions, is to be expected. The ordinary jury is often not equipped to grapple with the complicated calculations required in death actions. Rule 49(b) affords a fair and expeditious method for court and jury to work together to reach a definitive and final result. The only alternative is a lengthy retrial which the Rule was intended to avoid.

United cites three cases in support of its argument that it is improper to mathematically compute the damages in a wrongful death action. (U. Br. 87.) The cases do not support its argument.

In *Hinsdale v. New York, N.Y., N.H. & H.R. Co.,* 81 N.Y.S. 356 (1903), incorrectly cited in the brief, the sole issue was whether a surviving widow and mother could offer into evidence the cost of an annuity, based on deceased's expectation of life, sufficient to produce a yearly income equal to his annual income at the time of his death. The court held that such evidence was not admissible because the annuity figure dealt with the total earnings of the decedent rather than with the pecuniary loss suffered by the plaintiffs. It was held that the evidence of the cost of such an annuity was not admissible because it would distract the jury from the real duty that is imposed upon them to determine the pecuniary injuries resulting from the decedent's death.

In *Union Pac. Ry. Co. v. Dunden,* 37 Kan. 1, 14 Pac. 501 (1887), no issue of "mathematical calculation" was involved. The trial court had declined to submit any special questions to the jury on the issue of damages, and the exercise of this discretion was upheld.

As this court has indicated, the submission of special interrogatories lies in the sound discretion of the trial court and the granting or refusal thereof does not constitute error.

Emery v. Southern Calif. Gas Co., 72 Cal. App. 2d 821, 165 P. 2d 695 (1946) holds that it is prejudicial error in a wrongful death action to exclude the testimony of an actuary and charts prepared by the actuary, for the purpose of showing present value of future loss of support. The case also implicitly holds that counsel in his argument to the jury may discuss the computations and mathematical deductions of the actuary. The court does hold that this evidence concerning earnings is just one of a number of elements relating to damages, which the jury was required to consider. Here the interrogatories covered the various elements of damages. To the extent that the *Emery* case is in point, it clearly supports the appellees' position.

The learned court below found it impossible to harmonize or reconcile the answers to the interrogatories with the general verdict, it being clear to the trial judge, who as the record demonstrates closely followed the evidence throughout the trial, that the jury had made errors in its calculations. Aside from the question of pre-judgment interest, United does not dispute the validity of the trial court's calculations. Indeed, the only argument made by United is that there is no inconsistency between the answers to the interrogatories and the general verdict because the jury can render any general verdict it pleases.

So far as the question of interest is concerned, it is submitted that the trial court fairly decided this question. (216 F. Supp. 734, 742.) As a matter of simple justice, if a discount rate of 4% was fixed to reduce plaintiffs' recovery, the same rate of interest was required to compensate plaintiffs for the delay from decedents' deaths to day of judgment.

Moreover, as a matter of law, the trial court was correct in holding that absent a Nevada rule to the contrary, pre-judgment interest should be treated as an element of the loss suffered by the survivors. A wrongful death action is not like an ordinary tort action where injuries and consequences of injuries continue up to the date of trial and beyond. Under a wrongful death statute, the entire loss occurs at one time and is measured as of that time. See 4 *Restatement, Torts,* §913(1)(b); *Battistoni v. New York,* 1 N.Y. A.D. 2d 926, 149 N. Y. S. 2d 614 (1956).

The trial court properly invoked Rule 49(b) in submitting the interrogatories to the jury herein on the issue of pecuniary damages. Under Rule 49(b), the trial court was empowered to enter judgment based on the answers to the interrogatories after making the appropriate calculations. No legal or constitutional rights of United were violated by the actions of the trial court.

Conclusion.

The judgments below in favor of appellees should all be affirmed in their entireties.

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I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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